No. 2942

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHERN PACIFIC COMPANY, a corporation,
Plaintiff in Error,
vs.
GERTRUDE WRIGHT and ORENE WRIGHT and ORA WRIGHT, by GERTRUDE WRIGHT, their Guardian *ad Litem*,
Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR

IN ERROR TO THE UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

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STATEMENT OF CASE

The present writ of error is brought for the purpose of reviewing a judgment of the trial court based upon a verdict of the jury awarding the defendants in error the sum of $12,000, and against the plaintiff in error, for damages alleged to have

been suffered by them because of the death of George R. Wright, the husband and father of the defendants respectively, alleged to have been caused by the negligent acts of the Southern Pacific Company, the plaintiff in error.

The suit was originally commenced in the Superior Court of the County of Fresno by the widow and minor children, but upon proper proceedings had was removed to the District Court in and for the Southern District of California, Northern Division. The case came on regularly for trial, resulting on May 5th, 1916, in a verdict as stated, from which verdict and judgment this writ is prosecuted.

The facts out of which this litigation arose are briefly these:

The deceased, George R. Wright, met his death on May 22nd, 1914, while attempting to cross the track of the Southern Pacific Company at a point where Arrant Street crosses the tracks of the plaintiff in error in Selma, California. At that particular place there were four tracks, two of them East of the main line and one West of the main line. The accident occurred upon the main line, at about 9 o'clock on the morning of May 22, 1914. The deceased, with one Fred Tucker, was riding in an automobile truck which the deceased had rented of the owner in Fresno, with the understanding that Fred Tucker, who was familiar with the machine, should drive it. Incidentally, Fred Tucker was demonstrating the machine to the deceased as a possible purchaser. They had been to a point North

of Selma to fill the car with distillate at the Standard Oil Works, then proceeded in a Southerly direction on the Easterly side of said tracks and parallel therewith for about 1400 feet, where they commenced to turn to the right for the purpose of crossing the tracks of the company at Arrant street. The truck was what is known as a 3½-ton (carrying capacity) Kelly truck, left-hand drive, so that the deceased, at and just prior to the time of the accident, was on the side nearer the railroad tracks. At all times the view was wholly unobstructed. The train that collided with the truck was a regular passenger train of the company, was on time, and immediately prior to the accident was running at about 30 miles an hour. Mr. Fred Tucker survived the accident and was a witness for the defendants in error. Mr. Wright was killed instantly. The truck was empty and was proceeding down East Front Street at about 6 miles an hour until they came to the turn for the crossing, when the speed was slackened to 3 or 4 miles an hour. When they started to make the turn, Mr. Tucker, at a point distant about 145 feet from where the accident occurred, looked up the track in the direction from which the train was coming, but saw no train. He never looked again, although his vision was absolutely unobstructed, until he was practically on the main track and the train right on him, when it was too late to avoid the accident, the train striking the rear wheel of the truck with the result stated. Both Tucker and the deceased en-

joyed perfect eyesight and hearing, and both were familiar with the crossing.

At the close of the plaintiff's case, the defendant moved for a non-suit, which was denied, and the defendant and plaintiff in error thereupon rested, asking the Court to instruct the jury in favor of the defendant company, which was refused, and the verdict rendered as stated.

The following is a specification of the errors relied upon, setting out separately and particularly each error asserted and intended to be urged, and where the error alleged is to the admission of evidence the specification quotes the full substance of the evidence admitted, and where the error alleged is to the charge of the court the specification sets out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused.

SPECIFICATION OF ERRORS

1.

The Court erred in overruling the objection of counsel for plaintiff in error to the introduction in evidence of Section 17 of Ordinance No. 51 of the city of Selma, specified in the Bill of Exceptions as Exception No. 3, as follows:

"Mr. Gallaher.—I have it. We desire to introduce in evidence, so that this book may not be retained here, Section 17 of Ordinance No. 51 of the city of Selma, commonly known and entitled as

the misdemeanor ordinance of the city of Selma. We offer Section 17.

Mr. Cory.—We object to that as irrelevant, incompetent and immaterial, if the Court please, not shown to have been adopted in any manner at any meeting of said city trustees, or published as required by law, or duly authenticated in any way.

Mr. Gallaher.—The statute providing for the keeping of an ordinance book in the State of California provides it shall be *prima facie* evidence as to the existence, force and effect of the ordinance as therein set forth.

The Court.—The objection is overruled.

Mr. Cory.—We except.

Mr. Gallaher.—We desire to read into evidence, so that the book may be returned, Section 17, appearing at page 197 of the (89) Book *or* Ordinances.

Mr. Kauke.—Mr. Cory, do you want the whole ordinance read? Do you desire the whole ordinance read?

Mr. Cory.—No, I don't care anything about it.

Mr. Gallaher.—(Reading): 'Section 17. Any person who shall run or propel any railroad car, locomotive, hand-car, horse car or any train of cars in this town at a greater rate of speed than eight miles per hour, or in such manner as to endanger or obstruct the free passage of any public street, is guilty of a misdemeanor.' The certificate is: 'Passed at a regular session of the board of trustees of the town of Selma held this 26th day of Decem-

ber, 1896'—giving the vote and certified by the clerk. That is all."

(See Tr. pp. 37, 38, 99 and 100, covering Exception No. 3 of the Bill of Exceptions herein and Assignment of Error No. 3).

2.

The Court erred in denying the motion of plaintiff in error for non-suit specified in the Bill of Exceptions as Exception No. 10, as follows:

"The defendant made a motion for nonsuit, upon the grounds that the evidence of the plaintiff showed beyond any substantial or other conflict that the accident complained of was caused solely and alone by the contributory negligence and want of care of the deceased; that it disclosed that the driver of the machine and the deceased had a clear and unobstructed view of the track upon which the train was approaching when they were a distance of 145 feet from the track on which the accident occurred, and if, during any portion of that distance, either the deceased or the driver had looked in the direction from which the train was approaching, they could have seen it and thus avoided the accident.

After argument, the motion was submitted to the Court for decision and was by the Court overruled, to which ruling the defendant then and there excepted, as set forth in said Exception No. 10 of the Bill of Exceptions."

(See Tr. pp. 70, 104 and 105, being Exception No. 10 of the Bill of Exceptions herein and Assignment of Error No. 10 herein).

3.

The Court erred in giving the jury the following instruction:

"Section 486 of the Civil Code of this State provides as follows: 'A bell, of at least twenty pounds weight, must be placed on each locomotive engine, and be rung at a distance of at least eighty rods from the place where the railroad crosses any street, road, or highway, and be kept ringing until it has crossed such street, road, or highway; or, a steam whistle must be attached and be sounded, except in cities, at the like distance, and be kept sounding at intervals until it has crossed the same.'

The corporation is liable for all damages sustained by any person, and caused by its locomotives, trains, or cars, when the provisions of this section are not complied with."

(See Tr. pp. 72, 73 and 107, being Exception No. 11 of the Bill of Exceptions herein and Assignment of Error No. 11 herein).

4.

The Court erred in instructing the jury as follows:

"An ordinance of the city of Selma, fixing the maximum rate of speed at which railroad trains may be operated within the corporate limits of the city, has been introduced in evidence, and, upon

the question of the alleged negligence of the defendant, you are instructed that if you find that the defendant failed to comply with such municipal ordinance at the time in question, then such failure on its part constituted presumptive negligence."

(See Tr. pp. 73 and 108, being Exception No. 11 of the Bill of Exceptions herein and Assignment of Error No. 11 herein).

5.

The Court erred in instructing the jury as follows:

"If you find that the automobile truck was operated and driven solely by the witness Tucker, and that the deceased had no control over the operation of the truck, or no right to exercise control over the same, and that he did not exercise any supervision or control over the same, then you are further instructed that in such case the negligence of Tucker (if he was negligent) is not to be imputed to the deceased so as to constitute contributory negligence on his part; but that to sustain the defense of contributory negligence, the defendant must prove or the evidence must show personal failure, on the part of the deceased to exercise ordinary care.

In other words, if you find that the deceased, Wright, was riding in the automobile truck, driven by the witness Tucker, and that he, Wright, had neither control of nor the right to control, such driver, and that he was not exercising or assuming control over the truck or such driver at the time

of the accident, then, to sustain the defense of contributory negligence on the part of the deceased, it must appear from the evidence that he, personally, as distinguished from the driver of the truck, failed to exercise ordinary care at and immediately prior to the time of the accident which caused his death. But deceased was required to exercise ordinary care in approaching said crossing."

(See Tr. pp. 75, 76, 109 and 110, being Exception No. 11 of the Bill of Exceptions herein and Assignment of Error No. 11 herein).

6.

The Court erred in refusing to charge the jury as requested in writing by the plaintiff in error, as set forth in Exception No. 13 of the Bill of Exceptions herein, as follows:

"You are further instructed that the direct and approximate cause of the accident in which George Reuben Wright was killed was the contributory negligence and want of care of the deceased and the driver of the truck, and your verdict therefore will be in favor of the defendant."

(See Tr. p. 79, being Exception No. 13 of the Bill of Exceptions herein, and p. 114, being Assignment of Error No. 13 herein).

7.

The Court erred in refusing to charge the jury as requested in writing by the plaintiff in error, as set forth in Exception No. 14 of the Bill of Exceptions herein, as follows:

"If you find from the evidence in this case that either the deceased, George Reuben Wright, or the driver of the truck, could have seen the train approaching the crossing at which the accident occurred before they attempted to cross the track upon which the train was approaching, and if the accident occurred as the result of their attempting to cross in front of the approaching train while it was in plain view, then the plaintiffs are not entitled to recover against the defendant and your verdict will be in its favor."

(See Tr. pp. 79, 80 and 114, being Exception No. 14 of the Bill of Exceptions herein and Assignment of Error No. 14 herein).

8.

The Court erred in refusing to charge the jury as requested in writing by the plaintiff in error, as set forth in Exception No. 15 of the Bill of Exceptions herein, as follows:

"You are further instructed that if you believe from the evidence that the direct and proximate cause of the accident was the attempt on the part of George Reuben Wright, deceased, and the driver of the truck, to cross the track in front of the approaching train, or if they had listened they could have heard it in time to have stopped their truck and prevented the accident, then you are instructed that the accident was occasioned by the negligence and want of care of George Reuben Wright and the driver of the truck and that the defendant was

not liable, and your verdict accordingly will be in favor of the defendant."

(See Tr. pp. 80, 81, 114 and 115, being Exception No. 15 of the Bill of Exceptions herein and Assignment of Error No. 15 herein).

9.

The Court erred in refusing to charge the jury as requested in writing by the plaintiff in error herein, as set forth in Exception No. 25 of the Bill of Exceptions as follows:

"You are further instructed that if you believe from the evidence that the approaching train was in plain view of either the deceased or the driver of the truck before they reached the track upon which the accident occurred, and that if either of them had looked he could have seen it before they crossed the track, or if either of them had listened he could have heard the train approaching before they crossed the track, and that if either of them had looked and listened before attempting to cross the track, he could have seen and heard the approaching train and thus avoided any danger, and that while the train was so approaching in plain view of the deceased and the driver of the truck, they attempted to cross the track in front of the approaching train, and that by reason only of any such attempt the accident occurred resulting in the death of George Reuben Wright, then I instruct you that such conduct on the part of de-

ceased and the driver of the truck was negligence and the plaintiffs cannot recover."

(See Tr. pp. 86, 87 and 120, being Exception No. 25 of the Bill of Exceptions herein and Assignment of Error No. 25 herein).

10.

The Court erred in refusing to charge the jury as requested in writing by the plaintiff in error, as set forth in Exception No. 27 of the Bill of Exceptions herein, as follows:

"You are further instructed that if you believe from the evidence that the employees of the defendant company failed to give the warning of the approach of the train either by blowing the whistle or ringing the bell, yet, if you further believe that under the instructions herein given you that either the deceased, or the driver of the truck, if he had looked could have seen, or if he had listened could have heard the approaching train in time to have avoided the accident by the exercise of reasonable care, then the plaintiffs are not entitled to recover."

(See Tr. pp. 88 and 89, 121 and 122, being Exception No. 27 of the Bill of Exceptions herein, and Assignment of Error No. 27 herein).

11.

The Court erred in refusing to charge the jury as requested in writing by the plaintiff in error, as set forth in Exception No. 30 of the Bill of Exceptions herein, as follows:

"You are further instructed that neither Mr. Wright nor Mr. Tucker had the right to depend upon the custom, or even the duty enjoined by law, of the engineer or fireman to give the customary signals of the approach of the train, as it was their duty, in approaching the crossing, to look and listen, irrespective of such signals. If, therefore, they could have seen or heard the approaching train if they had looked or listened in time to avoid the accident, then your verdict should be in favor of the defendant, even if you further believe that no warning whatever was given of the approaching train by the employees of the company."

(See Tr. pp. 91 and 124, being Exception No. 30 of the Bill of Exceptions herein and Assignment of Error No. 30 herein).

12.

The Court erred in refusing to charge the jury as requested in writing by the plaintiff in error, as set forth in Exception No. 31 of the Bill of Exceptions herein, as follows:

"You are further instructed that if you believe from the evidence that the train was approaching the crossing at an excessive rate of speed and in violation of the ordinance, yet, that fact is immaterial if you further believe that if Mr. Wright or Mr. Tucker had looked towards the approaching train, they could have seen it at any time sufficient to have prevented the accident, then the responsibility of the accident lies with Mr. Tucker and Mr.

Wright, and your verdict must be in favor of the defendant."

(See Tr. pp. 91, 92, 124 and 125, being Exception No. 31 of the Bill of Exceptions and Assignment of Error No. 31 herein).

13.

The Court erred in refusing to charge the jury as requested by the plaintiff in error, in writing, as set forth in Exception No. 32 of the Bill of Exceptions herein, as follows:

"You are further instructed that if you believe from the evidence that the employees of the defendant were negligent, that the train was going at an excessive rate of speed, that the whistle of the engine never blew nor the bell rang, and that no warning of any kind was given to Mr. Tucker or Mr. Wright by the engineer or fireman of the train, yet, if you believe from the evidence that Mr. Wright or Mr. Tucker could have seen or heard the approaching train in time to have avoided the accident, if they had looked or listened, then your verdict must be in favor of the defendant."

(See Tr. pp. 92, 93 and 125, being Exception No. 32 of the Bill of Exceptions and Assignment of Error No. 32 herein).

14.

The Court erred in refusing to charge the jury as requested in writing by the plaintiff in error, as set forth in Exception No. 33 of the Bill of Exceptions herein, as follows:

"You are further instructed that it was Mr. Wright's duty, in approaching the crossing, equally with Mr. Tucker's, to have looked and listened for the approaching train. If, therefore, you believe from the evidence, that if Mr. Wright had looked or listened at any time before the truck actually reached the track upon which the accident occurred, he could have seen or heard the train in time to have avoided the accident, then your verdict must be in favor of the defendant."

(See Tr. pp. 93, 125 and 126, being Exception No. 33 of the Bill of Exceptions herein and Assignment of Error No. 33 herein).

15.

The Court erred in refusing to charge the jury as requested in writing by the plaintiff in error, as set forth in Exception No. 34 of the Bill of Exceptions herein, as follows:

"You are further instructed that Mr. Wright at the time of the accident was in charge and control of the truck, and therefore the negligence of Mr. Tucker at the time of the accident, if you find that he was negligent, is to be imputed and regarded as the negligence of Mr. Wright. If, therefore, you find under these instructions that Mr. Wright or Mr. Tucker were negligent at the time of the accident, then your verdict must be in favor of the defendant."

(See Tr. pp. 93, 94 and 126, being Exception No. 34 of the Bill of Exceptions herein and Assignment of Error No. 34 herein).

16.

The Court erred in refusing to charge the jury as requested in writing by the plaintiff in error, as set forth in Exception No. 35 of the Bill of Exceptions herein:

"You are further instructed that the evidence in this case is not sufficient to justify a verdict in favor of the plaintiffs, and you will therefore render a verdict in favor of the defendant."

"(See Tr. pp. 94 and 126, being Exception No. 35 of the Bill of Exceptions herein, and Assignment of Error No. 35 herein).

BRIEF OF THE ARGUMENT

SPECIFICATION OF ERROR NO. 1

The Court erred in admitting in evidence Section 17 of Ordinance No. 51 of the City of Selma. The evidence conclusively shows that the violation, if there were any, of the ordinance in question neither proximately nor remotely contributed to the collision; in other words, there was no evidence which tended in any wise to show a causal connection between the collision and the alleged failure to observe the ordinance. This being so, evidence of the existence of the ordinance, and the breach of it

by the plaintiff in error, was irrelevant, and should have been rejected.

Fresno Traction Company vs. *The Atchison, Topeka & Santa Fe Ry.*, 22 *Cal. App. Decisions* 1119; citing *Davis* v. *California etc.* 105 *Cal.* 131 and *McKune* v. *Santa Clara etc.* 110 *Cal.* 480.

SPECIFICATION OF ERROR NO. 2.

The Court erred in denying the motion of plaintiff in error for a non-suit, as set out in specification of error No. 2. *The evidence shows without conflict that the accident was occasioned solely and alone because of the contributory negligence and want of care of the deceased and Fred Tucker.*

That the deceased was himself responsible for the accident resulting in his death is abundantly established by the record of this case. It is axiomatic that if George W. Wright and Fred Tucker, the driver of the machine, or either of them, by looking could have seen, or by listening could have heard, the approaching train in time to avoid the accident, then, as a matter of law, the deceased must be held at fault and no recovery can be had against the company. The case lies in a small compass, and as this is the crux of the case, it is necessary to refer at some length to the testimony upon which we base our claims.

FRED TUCKER testified for the plaintiffs in substance as follows:

My age is thirty-seven. I am and was in May, 1914, in the automobile business, selling and handling automobiles, and had been in that business about four years. I am familiar with the operating of machines and trucks, and on May 22, 1914, I was one of the parties that were in the collision on the Southern Pacific railroad tracks at Selma. I was using a 3½-ton Kelly truck. It was obtained from J. C. Phelan. I had full charge of the operating of the truck. Prior to the time of the accident that morning we had hauled one load of raisins to Del Rey and on the return trip filled up with distillate at the Standard Oil filling station. Mr. Wright had been riding with me on the truck that morning up to the time of the accident. I was driving as we were coming down from the Standard Oil tanks to the place of the accident. (Tr. p. 33). Mr. Wright had nothing to do with the operating of the machine. At the point of the accident, Arrant street crosses the Southern Pacific tracks at right angles. There is a street westerly and parallel to the railroad, called West Front street, and a roadway easterly parallel to the railroad track, called East Front street. There are two side tracks between East Front street and the main line. It is about 60 feet from the main line to the railroad from the right of way on East Front street, at right angles. It is approximately 1400 feet from the Arrant-street crossing to the Standard Oil Company's tanks. The next crossing north from the Southern Pacific tracks is beyond the oil tanks (Tr. p. 34). It is three city blocks from Arrant-street crossing to the passenger depot at Selma. After leaving the oil tanks we came southeast parallel the railroad, on East Front street. At about 145 ft.

in a circle, where we started to make the turn from the tracks, I looked for the trains which might be coming from the northwest and going southeast. I would travel about 145 ft. from that point of observation to the crossing of the main line. (Tr. p. 35.) At that point I looked at the track as far as I could see in making the angle. I looked up the track and could see with a clear vision to the oil tanks or a little further. I also listened for trains. My eyesight is perfect and my hearing is good. At that time I saw the railroad tracks from the crossing to a point beyond the oil tanks. I did not see any train, none in sight. I had not heard any warning sound in the way of a bell, whistle or otherwise (Tr. p. 36). At that point, about 145 feet from the main track where the accident occurred, I looked clear up the track, that it was clear in that direction. I got a good, clear view as far as the oil station or a little further. Then as Castle Bros. packing-house on the left hid the view both on the platform and side tracks there, I directed my view that way until I got clear out beyond until I knew everything was safe the way my view was headed. I looked to the left, which would be southeasterly, towards the depot and Castle Bros. packing-house. Then after I was through looking that way, I turned and looked the other way. I then had reached the point where the truck was practically going on the main line track, when I saw the train coming. Practically the front part of the truck was on the main line. I could only see the train coming, and didn't hear any whistle or bell. It seemed to be coming very fast (tr. p. 39). It was coming from the northwest. I opened up the throttle and tried to gain a little more speed. The auto-

mobile went forward. I watched this way until the train struck. That was the last I knew. The collision was about nine o'clock in the morning. I had known Mr. Wright about two years. He seemed to be a strong man, perfectly well (tr. p. 40). With reference to observing the train, I believe Mr. Wright looked up the track the first time I did, when we first made the circle. After that I did not observe because I was looking away from him. Nothing was done by him that I saw, or said by him to me, with reference to the train coming.

The witness was then referred to a blueprint map which was introduced in evidence, the original of which is now on file with the Clerk of this Court, as part of the record of this writ of error.

The witness then testified:

This map shows Arrant street running diagonally, and it then goes at right angles across the track (tr. p. 41). The rectangular space marked "Castle Bros. packing-house", that is the packing-house I referred to, the one where I looked to the southeast to notice trains coming up from the south. That map shows that we had to cross two tracks east of the main line before we could get to the main line where the accident occurred (tr. p. 42).

On cross-examination the witness testified as follows:

The day on which the accident occurred was a bright May day and no wind blowing. There was no unusual noise to distract my attention at the time we made this crossing. We proceeded down

from the oil station on East Front street. The truck was a left-hand drive. As we proceeded down towards Selma I was driving the truck and was on the east side of the truck, in other words, the side of the truck furthest away from the railroad. Mr. Wright was seated with me on the right side. There was only one seat on the truck and he was on the side nearest the railroad. In a way I was fulfilling two things, demonstrating the truck to Mr. Wright and also doing some work for him. He was paying for the use of the truck, renting it. I was driving the truck for Mr. Phelan. I had charge of it, was the driver to go with it, and Mr. Wright was paying the rental for it. It had been used one day before that. I should judge we were going about 6 miles an hour when coming down the highway until we got to the corner. The truck was empty. I was not talking to Mr. Wright and he was not saying a word from the time we were at least half-way down from the oil station to the time of the accident. On making the turn for the crossing, I slowed down to 3 or 4 miles an hour. When I started to make the turn I looked first towards the oil tanks to see that no train was coming. I didn't see any train and from that time proceeded on my way and never looked in the same way again to see if a train was approaching until I passed a clear vision of the packing-house (tr. p. 43). I was practically in the main track when I looked and saw the train coming right on us. For the 145 ft. I testified to, during that entire time while we were traversing the 145 ft. practically, I never looked again towards the oil tanks, or northwest, to see if the train was approaching. The view was not obstructed in any

way. The only thing there was to obstruct our vision, if it can be an obstruction, were some telegraph poles. The whole space there was unobstructed and there was no reason why, if I had looked, I could not have seen the train approaching. I am sure Mr. Wright's eyesight was good. It was good as far as I know, and his hearing was good. Before we reached the main track at that crossing on that day, we crossed two other tracks on the railroad. The main track was the third track. I measured the distance as near as I could. I stepped it. I have been there several times since the accident (tr. p. 44). The first time, to determine this point, I took a truck and drove it over the ground as near as I could the same speed that I drove it that day. I have no way of exactly locating the point where I say I looked, but the best of my recollection is that it was about 145 feet. I also stepped the distance between the crossing and the oil tanks. It was 1400 feet. As I came near the main line I could see further and further up the main track, so before I reached the main track there was nothing to obstruct my vision for miles up the main track except the poles. From the point where I was when I looked, the only obstruction would be the oil tanks, except the poles (tr. p. 45). The train struck the rear wheel of the machine. The rate of speed I think that we were going from the time I looked until we got to the main track was some 3 or 4 miles an hour (tr. p. 46). I made the arrangements with Mr. Phelan over the phone. Mr. Wright was to get the truck for $15 a day. I was to drive it. Somewhere north of the tanks was the city limits. The maximum speed of the truck when empty is 12 miles an hour.

It would not make 12 miles an hour loaded (tr. p. 47).

OSCAR THURMAN HESS, a witness for the defendants in error, testified in substance as follows:

I saw the accident in which Mr. George R. Wright was killed. At the time of the accident I was a letter carrier at Selma and was almost due south from where the accident occurred. That was about 200 ft. from the main track where this collision occurred. The accident was between 8:45 and 8:50 that morning (tr. p. 48). I saw the train coming. When I took particular notice it was between the oil tanks and the crossing, pretty well towards the oil tanks. When I noticed the train there was no whistle. I cannot swear positively whether the bell was ringing. I did not hear any bell when the train stopped. Before the collision I noticed the truck coming down the road on the east side of the track. I never noticed any blowing of the whistle during all that time. I saw the truck when it made the turn in the road to get to the railroad. I don't know just where the engine was then. At that time I was paying attention to both, because when that truck made the turn there they were getting close enough to be within danger if one or the other did not stop. I think the engine was below the oil tanks, between the tanks and the crossing. I noticed the train was not making much noise. It was going at the rate of 30 miles an hour (tr. p. 50). The truck was 100 ft. from the main track as near as I can estimate, at the time I saw the engine this side of the oil tanks. The engine struck the hind wheel (tr. p. 51). There

were seven coaches to the train and it came to a standstill where the last coach stayed on the crossing and blocked it. I didn't hear anything in the way of any grinding noise or brakes. At the time I saw the train and also the truck some hundred feet distant from the main track, I could hear the roaring or rumbling of the train, and could also hear the truck. I have no knowledge of hearing any bell or whistle.

On cross-examination this witness testified as follows:

I saw there was probably going to be an accident and was very much interested. I was watching the movements of both very closely (tr. p. 52). I knew the truck and knew that Mr. Tucker was demonstrating that truck in Selma. I watched the men in the truck. The only movement I could say positively that the men made was to raise just as the accident happened, both of them. I cannot say that I saw them make any movement at all until just before they got on the track. I was watching generally the movements. Just as it struck they both stood up. The train was coming down on the right-hand side of these men, and Mr. Wright would be nearer the train (tr. p. 53). When they were 100 ft. from the crossing I saw the train south of the oil tanks. There was nothing to obstruct the view of either Mr. Wright or Mr. Tucker of the approaching train. I think the train must have been at least 300 yards when I first saw it, as the truck began to turn into the crossing. When I first realized there was going to be an accident the train was a couple of hundred yards away. The truck was then about 100 ft. away, and the

train went two hundred yards. I knew from the fact that the main track is not far from the side track and there are two spurs on that side of the main line, and they were still coming on and as I could not notice any slackening of their speed, I thought "My goodness, are they going to come on?" I expected them to stop at any time. At this time the train was in plain view and had been in plain view ever since they had passed the oil tanks if they had wanted to look. The view is plain to the oil tanks. It was after they started to make the turn that I thought there was going to be an accident (tr. p. 54). At this point there is no grade to speak of, the tracks are practically level from the oil tanks, and the grade crossing is level with the tracks, and the tracks level with the road. It was a nice, pleasant May morning. I heard the train coming from the time I first saw it. I am familiar with the time that train reaches Selma. My business calls me to that neighborhood every morning, about the time that train comes along, and if I was on schedule time, I generally passed along there in that block when the train passed along, for six months. The train was practically on time that morning and came in just as it usually came in.

On re-direct examination this witness testified:

When I first thought there was danger of a collision the truck had almost completed the turn, but was not facing directly across the track at that time. The truck had not started to make the turn to the right when I noticed it. That turn to the right is about 125 to 130 ft. from where the collision occurred (tr. p. 56). From where it started to make the turn they had 125 ft. to travel to reach

the center of the track. In order to get into Selma they did not have to make this crossing. They could have gone on down East Front street. There were several ways they could have taken in order to get to Selma (tr. p. 57).

JOHN BRIDGES, a witness for the defendants in error, testified in substance as follows:

I reside a little south of the Standard Oil tanks on the west side of the railroad (tr. p. 57). I was at home at the time of the accident and had a full view of the railroad, both up and down. The accident occurred about 9 o'clock. I was almost halfway between where the accident happened and the oil station, on the west side. When I first saw the train it was up by the oil station, close to the city limits crossing. I saw it from there down to the place of the accident. I didn't hear the bell ringing. The whistle blew at the city limits, at the crossing. I didn't hear the whistle blow any more. I should judge the speed of the train was about 30 miles an hour. The truck was on the opposite side of the track, going the same way as the train. When it hit the truck there was quite a racket (tr. p. 58). The last car of the train was just a little below the crossing when it stopped. I heard no bell, whistle or alarm after it left the first crossing.

On cross-examination he testified:

It seems to me that train had been coming along through Selma at about that time of day, and that speed, for a year or more (tr. p. 59). There was no whistle or alarm, I didn't hear it. I was not out

there paying attention to whether the whistle blew or the bell rang. When the train is on time it is generally running about 30 miles an hour (tr. p. 60).

FLORENCE BOLES testified for the defendants in error in substance as follows:

I know the place where the collision occurred. I was about two blocks from the place of the accident, west of it. When I heard the crash I looked out, but could see nothing but dust (tr. p. 61). I had noticed the train coming in. I heard the rumble of the train, but did not notice any bell or whistle. The train had been running on that schedule for some little time and its passing was what called my attention to the time of day (tr. p. 62).

WADE CARGILE testified for the defendants in error as follows:

At the time of the accident I was near the depot. I was in the draying business, working for the deceased (tr. p. 63). The deceased was about thirty-seven years of age. He was in the draying business. I conducted the business for the widow for a time (tr. p. 64). The deceased's net earnings were something near $150 per month. The business varied. He was a very robust man and industrious, and was kind to his family, and his domestic relations were happy (tr. p. 65).

MRS. GERTRUDE WRIGHT, testifying, said:

I am the wife of George R. Wright. He was thirty-seven years of age. We were married in 1901. We had two children, both living, Orene and

Ora. My husband was in the truck business at the time of his death. He was paying for the business in installments. I was in the millinery business. He made about $175 per month (tr. p. 67). Our home life was happy. He owed $500 on the business when he was killed. He had agreed to pay $1500, and had paid all of that but $500. He purchased the business originally four years before his death. He had paid $1000 on it (tr. p. 69).

There was then introduced in evidence the American table of mortality, from which it appeared that the expectancy of life of Mr. Wright was 30.35 years; that of Mrs. Wright 35.33 years; and that of the children was respectively 47.45 years and 48.72 years.

There was also introduced in evidence the book of ordinances of the City of Selma, providing that any person who shall run or propel any railroad car, locomotive or any train of cars in the town of Selma at a greater rate of speed than eight miles an hour, is guilty of a misdemeanor. This ordinance was adopted on December 26, 1896 (tr. p. 37-38).

The appointment of Gertrude Wright as guardian *ad litem* was admitted (tr. p. 70).

The defendants in error then rested, whereupon the plaintiff in error made a motion for a non-suit upon the following grounds, to-wit: That the evidence of the plaintiff showed beyond any substantial or other conflict that the accident complained of was caused solely and alone by the contributory

negligence and want of care of the deceased; that it disclosed that the driver of the machine and the deceased had a clear and unobstructed view of the track upon which the train was approaching when they were a distance of 145 feet from the track on which the accident occurred, and if, during any portion of that distance, either the deceased or the driver had looked in the direction from which the train was approaching, they could have seen it and thus avoided the accident. This motion was denied, to which ruling the plaintiff in error then and there excepted (tr. p. 70). The plaintiff in error thereupon rested.

The map referred to was introduced in evidence, and certain instructions were given to the jury (tr. p. 71).

Among other things, the Court instructed the jury that if they believed from the evidence that on approaching the crossing at the time of the accident, no bell was rung or whistle sounded, or other warning signal given by the defendant company, that this constituted presumptive negligence.

Also, that if they found that the defendant company failed to comply with the ordinance mentioned, that such failure also constituted presumptive negligence (tr. p. 73).

Also, that there was no evidence before the jury that either the fireman or engineer had any actual knowledge or notice that either Mr. Tucker or Mr. Wright were crossing or attempting to cross the railroad track in front of the approaching train

and that no inference of negligence on the part of the defendant could be drawn because of the fact that the fireman and engineer might have known of the danger in which Mr. Tucker and Mr. Wright were placed, and that the last chance doctrine, so-called, had no application to the facts of this case.

Also, that if the negligence on the part of the deceased contributed in any manner directly or proximately to his death, there can be no recovery.

Also, that it is well settled that the railroad track of a steam railway must of itself be regarded as a sign of danger, and one intending to cross must avail himself of every opportunity to look and listen for approaching trains, and that if he sees an approaching train upon the track, or could have seen the same if he had looked, he must not place himself in a dangerous position by attempting to cross in front of it, and if, when the approaching train is in plain view, he attempts to cross in front thereof and an accident happens by which he is injured, he is guilty of contributory negligence (tr. p. 74).

Also, that to sustain the defense of contributory negligence on the part of the deceased, it must appear from the evidence that he personally, as distinguished from the driver of the truck, failed to exercise ordinary care at and immediately prior to the time of the accident which caused his death, and deceased was required to exercise ordinary care in approaching said crossing. (tr. p. 75-76).

The foregoing is the sum and substance of the testimony in this case with reference to the negligence and want of care of the plaintiff in error and the contributory negligence, if any, of the deceased. It was upon this testimony that the jury rendered a verdict against the defendant company in the sum of $12,000. We submit that no fair-minded person can read this testimony without being at once convinced that the responsibility for this accident must rest with the deceased and the driver of the truck. It is an admitted fact in the case that the train was in plain view of the deceased and Mr. Tucker while the truck was traversing 145 feet at the speed of 3 to 4 miles an hour; that if either the deceased or Mr. Tucker had looked at any time while passing over this distance, the approaching train could have been seen in ample time to have avoided the accident. In fact, Mr. Tucker concedes that the only reason he did not see the approaching train was because of his failure to look; that the deceased was on the side nearer the track, with equal, or even better opportunities for looking and listening than Mr. Tucker himself, and that the only reason the accident occurred was because they did not look up the track in the direction from which the train was approaching during the entire time taken in traversing the 145 feet mentioned. It is too plain for argument that neither the deceased nor Mr. Tucker looked or listened. If they, or either of them, had done either, the accident would not have occurred and Mr. Wright's life

would have been saved, as there was ample and abundant time to have stopped the truck before attempting to actually cross the track in front of the approaching train. Indeed, it would seem from the evidence that both Mr. Tucker and the deceased heedlessly, thoughtlessly, and without the slightest regard for their safety, continued their journey across the tracks and only awakened to a realization of their peril when it was then too late to avoid the accident. The only conclusion that can be drawn from this record is that the deceased and Mr. Tucker, in approaching the track in question, while passing over this distance of 145 feet were each entirely oblivious to the fact that a train might be approaching from the northwest. If the judgment, in the face of this evidence, can be sustained, we can hardly conceive of a case where the plea of contributory negligence would avail. It is a conceded and controlling factor in this case that the accident occurred solely because of their failure to look for the approaching train. Such is Mr. Tucker's statement, and all of the evidence corroborates it.

As we have seen, the jury were instructed, as the law of the case, that the deceased, as well as Tucker, was required to use ordinary care in approaching the crossing; that the last-chance doctrine did not apply, and that it was lack of ordinary care for one intending to cross a railroad track not to avail himself of every opportunity to look and listen for approaching trains and that if he could

have seen the approaching train, if he had looked, he should not have attempted to cross in front of it, and if, when the approaching train is in full view, he attempts to cross in front thereof, and an accident happens, he is guilty of contributory negligence.

These instructions, under the facts of the case, would seem to require a verdict in favor of the plaintiff in error. They were told, as a matter of law, that if a person attempts to cross in front of an approaching train which is in plain view, and he is injured, that in itself is a lack of ordinary care, and that the deceased, irrespective of Tucker's care and caution, was himself required to use ordinary care. In other words, that it was incumbent upon the deceased, as well as Tucker, not to attempt to cross the track in front of an approaching train which was in plain view. It being conceded in the evidence that they did make an atttempt while the train was in plain view, resulting in the accident, it would seem inevitably to follow that the verdict of the jury should have been in favor of the defendant company, and that the Court should have granted the motion for a non-suit.

The law relating to this question, both in the Federal and State courts, is entirely plain and well settled and in accord with the instructions given the jury.

A leading case and one quite analogous to the case at bar is that of *Brommer* v. *Penn. R. Co.*, 179 Fed. 577. The decision is by the Circuit Court of

Appeals, Third Circuit, and relates to a highway crossing accident at Camden, N. J. The opinion deals with three cases tried together and so presented in the appellate court.

One Brommer was driving his automobile over a grade crossing when it collided with a train. In the automobile were Mr. and Mrs. Henderson and Mrs. Blockson, all of whom Brommer had invited to ride with him. Mrs. Henderson was killed and the other three occupants injured. These three brought suits and in the trial court below Brommer was held guilty of contributory negligence and a verdict rendered against him, but verdicts were recovered by Henderson and Mrs. Blockson.

It appeared from the facts that Brommer had no previous knowledge of the approaches to the crossing. He came in sight of the crossing about 170 feet therefrom. The track, however, was shut out by hedges and houses on either side of the avenue from his sight. That the train causing the accident could not be seen coming until he got within 40 feet of the track, when it could be seen 500 or 600 feet from the crossing. Actual measurements showed that at a point 30 feet back from the track there was a clear view down the track for 1400 feet.

In considering the duty of the driver of the automobile under such circumstances, the Court, through Judge Buffington, says quoting from the case of *New York Central Co.* v. *Maidment*, 168 Fed. 23, 93 C. C. A. 415 (21 L. R. A. (N. S.) 794:

"With the coming into use of the automobile, new questions as to reciprocal rights and duties of the public and that vehicle have and will continue to arise. At no place are those relations more important than at the grade crossings of railroads. The main consideration hitherto with reference to such crossing has been the danger to those crossing. A ponderous, swiftly moving locomotive, followed by a heavy train, is subject to slight danger by a crossing foot passenger, or a span of horses and a vehicle; but, when the passing vehicle is a ponderous steel structure, it threatens, not only the safety of its own occupants, but also those on the colliding train. And when to the perfect control of such a machine is added the factor of high speed, the temptation to dash over a track at terrific speed, makes the automobile unless carefully controlled, a new and grave element of crossing danger. On the other hand, when properly controlled, this powerful machine possesses capabilities contributing to safety. When a driver of horses attempts to make a crossing and is suddenly confronted by a train, difficulties face him to which the automobile is not subject. He cannot drive close to the track or stop there, without risk of his horses frightening, shying, or overturning his vehicle. He cannot well leave his horse standing, and if he goes forward to the track to get an unobstructed view and look for coming trains he might have to lead his horse or team with him. These precautions the automobile driver can take, carefully and deliberately and without the nervousness communicated by a frightened horse. It will thus be seen an automobile driver has the opportunity, if the situation is one of uncertainty, to settle that uncertainty on the side

of safety, with less inconvenience, no danger, and more surely than the driver of a horse. Such being the case, the law, both from the standpoint of his own safety and the menace his machine is to the safety of others, should in meeting these new conditions, rigidly hold the automobile driver to such reasonable care and precaution as go to his own safety and that of the traveling public. If the law demands such care, and those crossing make such care, and not chance, their protection, the possibilities of automobile crossings accidents will be minimized."

The Court, continuing, says:

"Now, the plaintiff, by his own showing, had a vantage point 30 or 40 feet from the track where he could have stopped and seen a train at least 500 feet away. And it is equally clear that, if he had stopped and looked, this accident would not have happened. In the *Maidment* Case, *supra*, we said:

> 'The duty of an automobile driver approaching tracks, where there is restricted vision, to stop, look, and listen, and to do so at a time and place where stopping and where looking and where listening will be effective, is a positive duty.'

This rule is conducive to safety, and observation and experience have deepened our conviction of its soundness. We therefore adhere to it and now restate it, and the court below was clearly right in holding it was conclusive of this case. Here, as there, the driver of the machine, when stopping, looking, and listening, would have prevented the

accident, made chance, not stopping, the guaranty of his safety." * * *

'If a traveler,' says Wharton's *Law of Negligence*, quoted with approval in *Pennsylvania* v. *Righter*, 42 N. J. Law, 186, 'by looking along the road, could have seen an approaching train in time to escape, it will be inferred, in case of collision, that he did not look, or, looking, did not heed what he saw.' To the same effect are authorities cited in Elliott on *Railroads*, Sec. 1165.

The question of Henderson's negligence was then taken up by the Court, it being held that Brommer being culpably negligent, was Henderson any the less so; which is precisely the question presented here; and in that connection the court says:

"It is true there are cases, but this is not one of them, where a person hires a supposedly capable driver, and being regarded by the law as a passenger for hire, and as having no part in the management or control of the vehicle, is visited with no duty to help selfguard it. But this is a different case. Henderson was not a passenger, and Brommer was not a quasi carrier; but the whole party were united for a common purpose and had a common object in view. Brommer had no greater duty or obligation toward the others than they toward him. It is true he was running the machine; but if anything threatening the general safety of the party came within the knowledge of any of them, and he or she by timely warning was able to warn Brommer of such danger, and as a direct and proximate result of not doing so he or she suffered damage, how can it be said this was not negligence, and that thereby he

or she did not contribute to causing the accident? The cases in each of the states in this circuit would hold such conduct negligent." * * *

"Now, as we have before noted in Brommer's case, the proof is that Brommer was approaching the crossing at a two-mile gait (slower than a slow walk); that he was slowing up; that the machine was under control; that there was a place 30 or 40 feet back from the track where it could be seen for 500 or 600 feet. It is therefore clear that Henderson could safely have called on Brommer to stop, and that if he chose to allow him to make a running crossing, without knowledge of what he might encounter, he in fact joined him in testing the danger. * * *

But in our view the question before us is not whether Brommer's negligence is to be imputed to other occupants of the car, but whether they or any of them omitted that due care—and negligence is lack of due care—which under the circumstances they were bound to take. And to our view the court, in making the test of contributory negligence that 'plaintiffs must have in some measure actively participated by word or deed therein, so as in a sense to make his act their own', erred, for in *Little* v. *Hackett*, 116 U. S. 371, 6 Sup. Ct. 391, 29 L. Ed. 652, the Supreme Court held that acts of omission, as well as commission might constitute contributory negligence, saying:

'That one cannot recover damages for an injury to the commission of which he has directly contributed is a rule of established law and a principle of common justice. And it matters not whether that contribution consists of his participation in the direct cause of the injury, or in his omission of

duties which, if performed, would have prevented it. If his fault, whether omission or commission, has been the proximate cause of the injury, he is without remedy against one also in the wrong.'

It follows, therefore, that Henderson was under obligations to take due care of his own safety. He was not a passenger for hire. He was engaged in the common purpose of a pleasure ride with the driver of the machine. He knew they were approaching a railroad crossing. Being free from the engrossing work of operating the machine, and occupying a seat beside the driver, he was in an even better situation than Brommer to look out for the safety of the machine. His own safety and the instinct of self-preservation should have led him to do so. * * *

Measured by this standard, and the rule is founded on sound reason and is conducive to safety, we see no escape from the conclusion that Henderson was equally culpable with Brommer. He knew they were approaching a railroad crossing. As he approached he saw the view was shut off from the track. Thus ignorant of the safety or danger of the crossing, prudence, self-preservation, and the positive demand of the law called upon him to stop before attempting the passage. The machine was under control, by his own account, only going at a two-mile rate. Under the circumstances he was called to act, or, if he chose to keep silence and join in chancing the crossing, the law will not hold him faultless of his share of bringing about the accident."

The verdict in favor of Henderson was therefore reversed.

In the case of *New York Central, etc.* v. *Maidment*, 168 Fed. 21, it is said:

"Because of the fact that a collision between a railroad train and an automobile endangers, not only those in the automobile, but also those on board the train, and also because the car is more readily controlled than a horse vehicle, and can be left by the driver, if necessary, the law exacts from him a strict performance of the duty to stop, look, and listen before driving upon a railroad crossing, where the view is obstructed, and to do so at a time and place where stopping and looking and listening will be effective.

An automobile driven by plaintiff, in which he was riding with a friend, was struck by a train at a railroad crossing, and he was injured. There were double tracks, and plaintiff stopped 20 feet from the nearest track to allow a train on such track to pass, and then started ahead and was struck by a train on the other track going in the opposite direction. From the place where he stopped the tracks could be seen for a considerable distance in the direction from which the first train came; but owing to trees and other obstructions, he could not see more than 175 feet in the other direction. If he had stopped on the first track, he could have seen the approaching train when 700 feet away; but he did not stop. *Held*, that he took chances rather than precaution, and was chargeable with contributory negligence, which precluded a recovery for his injury from the railroad company."

In the case of *Northern Pac. Ry Co.* v. *Tripp*, 220 Fed. 286, it appears from the record that the accident occurred about 10 o'clock in the forenoon

of a bright July day. That the plaintiff was in the livery and had used automobiles for several years and owned and was operating the one in which he was at the time the accident occurred. That there was sufficient evidence of the defendant's negligence as to the speed of the train and the failure to give proper warning by a bell or whistle, but it was contended there, as here, that the undisputed evidence showed plaintiff's contributory negligence in not taking proper care; that after his view was unobstructed by two box cars, he had a distance to go before reaching the nearer rail of the main track of 43 feet, and from any point along this distance of 43 feet his view of the main track was unobstructed and he could see the approaching train for 800 feet. However, he did not look in this direction after passing the obstruction of the box car. His automobile was traveling about 5 miles per hour and he was looking to the west, where his view was obstructed, until he had gone 30 or 40 feet. If the plaintiff were traveling at 5 miles per hour, and had a distance to go of 116 feet before he reached the main track, a train running at 35 miles an hour would cover the 800 feet that is admitted to have been the limit of his vision down the main track, and be upon the crossing at the same time he would reach it. The Court considering this question says:

"For the distance of 43 feet in which he had a clear view to the east after passing that car, he

was master of his movements, with an ample factor of safety. If the speed at which he was driving was such that he had not enough time to look in both directions along the railway track, reasonable care required that he should control that speed until his safety could be assured. If one traveling in an automobile at 5 miles per hour may continue toward a railway track for a distance of 43 feet after passing an obstruction without looking in each direction, then one traveling in such a vehicle at 25 miles per hour need not look out for a distance of 235 feet, and a pedestrian walking at the not unusual rate of 3 miles per hour would be authorized to travel 25 feet while having opportunity for a clear view and neglecting it. * * *

In the case of *Chicago Great Western Ry. Co.* v. *Smith*, 141 Fed. 930, 73 C. C. A. 164, the person injured was walking across railway tracks, and after passing a 'dead engine' on one track had but 7 feet to go to the next track; but a failure to look while going that distance was held fatal to recovery by this court. It was said:

'These facts permit of no other conclusion than that the deceased went upon the coal track without taking the precautions necessary to determine whether he could do so in safety. This was negligence. The place was one of great danger, and the track was itself a warning. As was said in *Elliott* v. *Chicago etc. Ry. Co.*, 150 U. S. 245, 248, 14 Sup. Ct. 85, 86, 37 L. Ed. 1068: "It can never be assumed that cars are not approaching on a track, or that there is no danger therefrom." The law requires of one going into so dangerous a place the vigilant exercise of his faculties of sight and hearing at such short distance therefrom as will be

effectual for his protection, and if this duty is neglected, and injury results, there can be no recovery, although the injury would not have occurred, but for the negligence of others.'

In the case of *Horan* v. *Boston & M. R. R.*, 183 Fed. 559, 106 C. C. A. 535, one walking 15 feet to a railway track after having looked and listened and without looking again was held guilty of contributory negligence. A similar rule was applied to the driver of vehicles in the case of *Pyle* v. *Clark*, 79 Fed. 744, 25 C. C. A. 190, where the driver of a team stopped 15 to 25 feet from the railway track and looked in both directions before driving forward. This court said:

'Pyle was the driver of the team, and he was responsible for its movements. He was sitting on the north side of the wagon, on the side from which the train that collided with his wagon approached. His view of the track on which it came was unobstructed for 2,000 feet. His horses were not afraid of the cars, and they were standing still from 15 to 25 feet from the track. He sat quietly in his wagon for a minute after he looked to the north, and then, without looking north again, he drove slowly upon the track, and the engine coming from that direction caught him. His failure to use his eyes diligently, his failure to look to the north for an entire minute before he drove upon the track, and his act of starting his horses forward upon it, without glancing alternately in each direction, were acts of gross negligence. If he had not been guilty of them, the accident could not have happened. If he had not driven his horses upon the track in front of the approaching engine, there would have been no collision; and if he had looked to the north

immediately before he drove them forward, he would never have done so. Upon this state of facts, there was no escape from the conclusion that the negligence of Pyle was the proximate cause of the collision.'

See, also, *Chicago M. & St. P. Ry. Co.* v. *Bennett*, 181 Fed. 799, 104 C. C. A. 309; and note in 37 L. R. A. (N. S.) 139. * * *

In the present case the evidence is undisputed that the plaintiff was advised that his vision was limited at the time he looked to the east. He knew that it would grow more so until he approached the crossing over the house track, where it would be entirely cut off by the box car to the east. After he passed this obstruction he looked constantly to the west, where obstructions prevented effective vision, and he was aware that he had not looked again to the east, and so continued, until he reached the final danger point. The obstruction to the west, instead of being an excuse, was a warning, not only that he was in danger from that direction, but also from the opposite direction, because of his lack of attention there. Under such circumstances, his duty was plain. He should have taken time in which to glance in the opposite direction, where the slightest glance would have shown his danger, or he should have exercised his control over his vehicle, so that he could listen for approaching trains, or have stopped it, if necessary, until he could use his senses of sight and hearing, and the failure to do so was negligence on his part. *Chicago & N. W. Ry. Co.* v. *Andrew*, 130 Fed. 65, 64 C. C. A. 399; *Chicago, R. I. & P. Ry. Co.* v. *Pounds*, 82 Fed. 217, 27 C. C. A. 112; *Grimsley* v. *Northern Pac. Ry. Co.*, 187 Fed. 587, 109 C. C. A. 417; *Chicago, M. &*

St. P. Ry. Co. v. *Bennett*, 181 Fed. 799, 104 C. C. A. 309; *Chicago, B. & Q. R. Co.* v. *Munger*, 168 Fed. 690, 94 C. C. A. 176; *Davis* v. *Chicago R. I. & P. Ry. Co.*, 159 Fed. 10, 88 C. C. A. 488, 16 L. R. A. 424.

The motion for a directed verdict should have been sustained, on the ground that the evidence showed contributory negligence on the part of the plaintiff, and the judgment must accordingly be reversed, and a new trial granted."

In the case of *Rebillard* v. *Minneapolis, St. P. & S. S. M. Ry. Co.*, 216 Fed. 503, decided by the Circuit Court of Appeals for the 8th Circuit, in an action for damages arising in North Dakota, it appeared that the plaintiff was riding with others, as a guest, in an automobile at night. The lights gave out and they stopped at a town but could procure no light, except an oil lamp which was very dim. After traveling several miles, the machine went over the embankment into a cut made by the defendant railroad company and plaintiff was injured. It was claimed that, as the plaintiff was merely a guest of the owner and driver of the car and exercised no control over him, the driver's negligence was not contributory to him. Upon this question it is said on page 506;

"In *Little* v. *Hackett*, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652, which is the leading American case on this subject, and which has been followed by the American courts generally, the rule was established that the contributory negligence of the driver of a public conveyance would not be imputed

to a passenger. And this court in *Union Pacific Ry. Co.* v. *Lapsley*, 51 Fed. 174, 2 C. C. A. 149, 16 L. R. A. 800, and *City of Winona* v. *Botzet*, 169 Fed. 321, 94 C. C. A. 563, 23 L. R. A. (N. S.) 204, has extended this rule to a person who accepts a gratuitous invitation of the owner and driver of a vehicle to ride with him, even if it is not a public conveyance. But an examination of the many cases on that question shows that the writers of the opinions are careful to except a passenger or guest who with knowledge of the danger remains in such dangerous position. *Dyer* v. *Erie Ry. Co.* 71 N. Y. 228; *Brickell* v. *N. Y. C. & H. R. R. Co.*, 120 N. Y. 290, 294; 24 N. E. 449; 17 Am. St. Rep. 648; *Transfer Co.* v. *Kelley*, 36 Ohio 86, 91; 38 Am. St. Rep. 558; *Wabash etc. Ry. Co.* v. *Shacket*, 105 Ill. 364, 44 Am. Rep. 791; *Davis* v. *C. R. I. & P. Ry. Co.*, 159 Fed. 10, 19; 88 C. C. A. 488, 497, 16 L. R. A. (N. S.) 424; *Brommer* v. *Pennsylvania Ry. Co.*, 179 Fed. 577, 581, 103 C. C. A. 135, 29 L. R. A. (N. S.) 924; *Dean* v. *Pennsylvania R. R. Co.*, 129 Pa. 524, 18 Atl. 718, 6 L. R. A. 143, 15 Am. St. Rep. 733.

In *Davis* v. *C. R. I. & P. Ry. Co.*, *supra*, this court quoted with approval the following extract from *Brickell* v. *N. Y. C. & H. R. R. Co.*, *supra:*

'The rule that the driver's negligence may not be imputed to the plaintiff should have no application to this case. Such rule is only applicable to cases where the relation of master and servant or principal and agent does not exist, or where the passenger is seated away from the driver by an enclosure, and is without opportunity to discover danger and to inform the driver of it. It is no less the duty of the passenger, where he has the

opportunity to do so, than of the driver to learn of danger, and avoid it if practicable.'

The same rule is laid down in *Schultz* v. *Old Colony Street Ry. Co.*, 193 Mass. 323, 79 N. E. 873, 8 L. R. A. (N. S.) 597, 118 Am. St. Rep. 502, 9 Ann. Cas. 402; *Partridge* v. *Boston & M. Ry. Co.*, 184 Fed. 219, 107 C. C. A. 49.

The plaintiff, as a reasonably prudent person, must have known of the danger incident to riding in a motor car on a dark night, without lights, over roads with which neither the driver of the car, nor any of the persons with him in the car, were familiar. When with the full knowledge of that fact the plaintiff remained in the car he was as guilty of negligence as the driver himself. As stated by Judge Phillips in the *Davis* case:

'The law of common sense applied to such a situation is that the movement and control of the vehicle is as much under the direction and control of the one as of the other.'

The action of the court in directing a verdict in favor of the defendant was right, and the judgment is accordingly affirmed."

In the case of *Erie R. Co.* v. *Hurlburt*, 221 Fed. 907, the decision being rendered by the Circuit Court of Appeals for the Sixth Circuit on April 6, 1915, it appears that the accident happened in the State of Ohio; that at the close of the plaintiff's evidence, a motion was made by company for a directed verdict, which was overruled, but it was held that the company waived the exception to the ruling made by the Court by thereafter introducing evidence in its own behalf, which differentiates it

from the case at bar. It was further contended that the Court erred in refusing to instruct the jury to return a verdict for the company on all the evidence, which contention was sustained by the Appellate Court and the case reversed.

It appeared from the evidence that there was only one surviving witness to the accident and that her testimony touching the question of contributory negligence was wholly undisputed. That the buggy containing Mrs. Hurlburt and her husband was struck by one of the company's engines at a highway crossing, killing her husband and seriously injuring Mrs. Hurlburt. The accident occurred at 9 o'clock in the morning. The weather was clear and cold. They were traveling along the highway with the curtains of the buggy down, and they were well wrapped up. East from the point of crossing the track could be seen for nearly 1500 feet. The train was on the track farthest from the travelers. They stopped when they reached a point about 15 feet from the nearest rail of the track next to them, and both of them looked East along the track and listened for the train. They neither saw nor heard it. Thereupon, the husband, who was driving and sitting on the right side of the buggy, started the horse, which began to trot. The husband made no further effort to ascertain if it were safe to cross, but Mrs. Hurlburt said that through an opening in the curtains, she watched the track from the east from the time the horse started until the collision,

but that she saw no train because the train was not there.

Upon this state of facts the Appellate Court said, quoting from the opinion of Mr. Justice White (now Chief Justice), in speaking for the Supreme Court, in *Southern Pacific Co.* v. *Pool*, 160 U. S. 440, 16 Sup. Ct. 339, 40 L. Ed. 485:

"There can be no doubt where evidence is conflicting that it is the province of the jury to determine from such evidence the proof which constitutes negligence. There is also no doubt, where the facts are undisputed * * * that the question of negligence is one of law.'

Assuming for the moment that Mrs. Hurlburt was driving the horse on the occasion in question, and was chargeable with exercising that degree of care imposed by law, upon one in charge of a team, and driving along a highway, as in this case, could there be any doubt as to the conclusions of fair-minded men as to her contributory negligence under the facts stated? Under the assumed case, it would be her duty to look. This she said she did. If she looked, she was chargeable with seeing what there was to be seen, by an ordinarily prudent person, in the exercise of reasonable care while looking. If she looked attentively, and failed to see what was plainly to be seen, then she was negligent; and if such negligence was a proximate cause of the injury, then in such case we think the jury should have been told to return a verdict for the company. *N. P. Railroad* v. *Freeman*, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014; *I. C. R. R. Co.* v. *Ackerman*, 144 Fed. 959, 76 C. C. A. 13; *Kallmerten* v. *Cowen*, 111 Fed. 297, 49 C. C. A. 346; *Philadelphia &*

R. R. Co. v. *Peebles*, 67 Fed. 591, 14 C. C. A. 555.
* * *

Thus it appears that she had voluntarily entered upon the task of looking out for her own safety, and, if her evidence is to be believed, she was using her own eyes and ears for that purpose, wholly independently of her husband, and was therefore responsible for her own personal negligence. *Cotton* v. *Willmar & Sioux Falls Ry. Co.*, 99 Minn. 366, 109 N. W. 835, 8 L. R. A. (N. S.) 643, 116 Am. St. Rep. 422, 9 Ann. Cas. 935; *Rebillard* v. *Minneapolis Ry. Co.*, 216 Fed. 503, 133 C. C. A. 9.

If both of them were engaged in looking and listening for a train, as they evidently were, then the negligence of each, while so engaged, must be regarded as the negligence of both of them. *Railroad* v. *Kistler*, 66 Ohio St. 327, 64 N. E. 130. So that from any view that we take of the undisputed evidence of the defendant in error, it follows that she is chargeable with her own negligence on the occasion in question. * * *

We are of the opinion that it was error to refuse the company's motion for a directed verdict at the close of all the evidence."

The decisions in our State are uniformly to the same effect. A leading case in this State is that of *Herbert* v. *Southern Pacific Company*, 121 Cal. 227, 53 Pac. 651, where it is said:

"But the cases arising from injuries suffered at railroad crossings have been so numerous, and upon certain points there has been such absolute accord, that what will constitute ordinary care in such a case has been precisely defined, and if any element

is wanting, the courts will hold as a matter of law that the plaintiff has been guilty of negligence. And, when injury results which might have been avoided by the use of proper care, the plaintiff cannot recover, although the defendant has also been guilty of negligence. In this special case the amount of care, as well as the nature of it, has been well settled."

In the case of *Holmes* v. *South Pac. Coast Ry. Co.*, 97 Cal. 161, 31 Pac. 834, the court says:

"A railroad track upon which trains are constantly run is itself a warning to any person who has reached the years of discretion, and who is possessed of ordinary intelligence, that it it not safe to walk upon it, or near enough to be struck by a passing train, without the exercise of constant vigilance in order to be made aware of the approach of a locomotive, and thus be enabled to avoid receiving an injury; and the failure of such a person so situated with reference to the railroad track, to exercise such care and watchfulness, and to make use of all his senses in order to avoid the danger incident to such situation, is negligence *per se*."

In the case of *Pepper* v. *Southern Pacific Co.*, 105 Cal. 389, 38 Pac. 974, the following language is used:

"There is not only no evidence that the deceased used any care or made any effort to ascertain whether a train was approaching, but the evidence excludes the possibility of his having used any reasonable care or caution in approaching the crossing. The fact that his view was obstructed

after he crossed University Avenue, made it negligence on his part to drive at a rate of speed which not only interfered with his hearing an approaching train, but made it difficult or impossible to stop. If he could not see an approaching train because his vision was obstructed ordinary care for his own safety required him to stop in order that his hearing should not also be obstructed, and *in any event to make his approach so slowly as to give him complete control of his team, and enable him to stop instantly if occasion required.* (Italics ours).

So far as the negligence of the deceased is concerned we see no conflict in the evidence; and it is well settled in this state and elsewhere, that, if his negligence contributed proximately to the accident resulting in his death, the plaintiff cannot recover, even though the defendant negligently omitted to give the warning of the approach of the train which the law and its duty required. * * *

It is said, however, that the train was running at a rate of speed faster than usual. This could not affect the question, since the deceased could not have been misled by the unusual speed of the train, unless he saw or heard the train and undertook to cross ahead of it; *and to make such attempt and fail is conclusive evidence of negligence.*"

In the case of *Herbert* v. *Southern Pacific Co.*, 121 Cal. 227, 53 Pac. 651, already referred to, Temple, J., speaking for the court says:

"He (the plaintiff) proceeded at the rate of from six to seven miles an hour, until he got within about three rods, whence he proceeded on a walk to the crossing. He could see from the eminence

from whence he had the last sight of the track that at that time the train was not within sixteen hundred and twenty feet of the crossing and would have to make that distance while he was going four hundred and fifty feet. That is, he would have known these facts had he known the precise distances, and these he did not know. He could only estimate. Nor did he know how rapidly the train would move. * * * As a matter of fact, they reached there at about the same time, though the plaintiff might have escaped 'with the skin of his teeth' had not his horse, startled by the sudden appearance of the engine, stopped at the track. * * *

It was a most reckless race with death, and if it does not present a case free from doubt, such a case cannot be imagined."

In the case of *Studer* v. *Southern Pacific Co.*, 121 Cal. 400, 53 Pac. 942, it is said:

"The defendant is not liable for the injury sustained by the plaintiff, unless it occurred solely by its fault and negligence, and not in any degree through the fault or negligence of the plaintiff. (See also *Railroad Co.* v. *Houston*, 95 U. S. 697; *Memphis etc. R. R. Co.* v. *Copeland*, 61 Ala. 376)."

In the case of *Green* v. *Southern Pac. Co.* 132 Cal. 254, 64 Pac. 256, the deceased was killed while crossing the track of the defendant. In discussing the question, the court says:

"It is the settled rule in this state that contributory negligence is a defense to be affirmatively established by the defendant, unless it is shown or can be inferred from the evidence given in support of the

plaintiff's case. (*Robinson* v. *Western Pacific R. R. Co.*, 48 Cal. 426). It is also well settled that while contributory negligence is a question of fact to be determined by the jury, yet when the facts are undisputed the question is one of law for the court (*Glasscock* v. *Central Pacific R. R.* Co., 73 Cal. 137); and if evidence thereon is without conflict, and of such a character that the only conclusion to be reasonably drawn therefrom is in favor of its existence, the court may grant a non-suit at the close of the testimony or may direct a verdict for the defendant. (*Davis* v. *California Street R. R. Co.*, 105 Cal. 131; *Herbert* v. *Southern Pacific Co.*, 121 Cal. 227).

The noise caused by the rumble of his empty wagon was an additional reason for caution, and his knowledge that the track was hidden by the corn was a reason for his taking more than ordinary precautions against meeting the train. Instead of taking any precautions, the testimony of all who saw him is that he was driving at a rapid gait towards the crossing. The only inference to be drawn from his conduct, in view of his knowledge of the surroundings, is, that he was attempting to get across the track before the cars should come along. If such be the case, it can only be regarded as recklessness. (*Hager* v. *Southern Pacific Co.*, 98 Cal. 309).

In the case of *Green* v. *Southern Cal. Ry. Co.*, 138 Cal. 1, 70 Pac. 926, it appeared that this also was an action brought by the relatives of the deceased to recover damages for her death, she being killed while attempting to cross the track of the defendant. This case, in some particulars, is pre-

cisely similar to the case at bar, as it appears from the decision that the deceased and the lady accompanying her drove right along, without looking to the east, or stopping to listen until the horse was within a few feet of the track, and then seeing the train nearly upon them, the horse was whipped and made to cross immediately in front of the locomotive, which struck the wagon and caused the damage. In commenting upon the testimony, McFarland, J., speaking for the court, says:

"This was extreme carelessness and recklessness. If they had stopped to listen, or after passing the foundry had looked over or through the picket fence, or had looked when they came to the line of the right of way, they would have seen the approaching train, and could have avoided any danger. They could have escaped by stopping, instead of whipping the horse in front of the locomotive; but carelessness had been committed before reaching that point. Their conduct was simply that of one who without any care whatever recklessly goes in front of a rapidly and nearly approaching train; and if that conduct does not constitute contributory negligence, then a railroad company must be held liable for damages in all cases of collision, without any reference to the conduct of the parties injured."

In the later case of *Green* v. *Los Angeles etc. Ry. Co.*, 143 Cal. 31, 76 Pac. 719, the same principles of law are asserted. The evidence in that case discloses that the deceased approached the track of the defendant on foot and by daylight at a point from which it was plainly visible to a dis-

tance of eight hundred feet to the eastward. That when thirty feet distant from the track the deceased was seen to look towards the east, and then immediately advance along a path which crossed the track at an angle of about thirty degrees. She then advanced slowly along the path without again looking up, and when in the act of stepping on the track she was struck by the locomotive and killed. In the course of the decision the court says:

"Under these circumstances it is clear, in view of numerous decisions of this court, and of the great weight of authority elsewhere, that she cannot be acquitted of culpable negligence directly contributing to the fatal result. While it is true that negligence is ordinarily a question of fact, it is, in some cases, a conclusion of law. * * *

A person on foot, in possession of all his faculties, and in complete control of his own movements, stepping on a railroad track immediately in front of a train which has been moving eight hundred feet at a speed of less than thirty miles an hour, in full view, is clearly guilty of negligence. Upon this point the case of *Holmes* v. *South Pacific Coast Ry. Co.*, 97 Cal. 167, is conclusive authority. There it was said:

'A railroad track upon which trains are constantly run is itself a warning to any person who has reached years of discretion, and who is possessed of ordinary intelligence, that it is not safe to walk upon it, or near enough to it, to be struck by a passing train without the exercise of constant vigilance, in order to be made aware of the approach of a locomotive, and thus be enabled to avoid receiving injury; and the failure of such person so

situated with reference to the railroad track, to exercise such care and watchfulness, and to make use of all his senses in order to avoid the danger incident to such a situation is negligence *per se.*' This statement of the doctrine of negligence *per se*, made ten years ago, was based upon several decisions of this and other courts, cited in the opinion of Justice DeHaven, and the rule has been applied in a number of more recent cases decided here. (See *Herbert* v. *Southern Pacific Co.*, 121 Cal. 227; *Bailey* v. *Market Street Ry. Co.*, 119 Cal. 329; *Lee* v. *Market Street Ry. Co.*, 135 Cal. 295; *Green* v. *Southern California Ry. Co.*, 138 Cal. 1, and cases cited).

These opinions show that persons who cross railroad tracks, either on foot or in vehicles, are strictly held to the duty of careful observation and attention. In each of these cases the plaintiff was injured notwithstanding some care on his part. In each case a judgment of non-suit was sustained. In each case the defect in plaintiff's cause of action was the same. The defect was, that though he exercised care at first, he did not continue to be careful, but became inattentive to his surroundings before he reached a place of safety.

To be sure the statute requires a railroad company to give specified warnings, but it neither takes away a man's senses nor excuses him from using them. The danger may be there; the precaution is simple. To stop, to pause, is certainly safe. His time to do so is before he puts himself in the very road of casualty."

The latest expressions of our Supreme Court are all in line with the doctrine thus announced. One

of the latest expressions is that found in the case of *Larrabee etc.* v. *Western Pacific Ry. Co.*, 52 Cal. Dec. 601. (Dec. 4, 1916), 161 Pac. 750.

This action was brought to recover damages from the defendant for causing the death of the plaintiff's intestate, the same as here. Trial was had before a jury which gave its verdict for the plaintiff, from which an appeal was prosecuted.

The facts appear to be that the deceased, while traveling southward in a horse-drawn hay wagon along the county road, was struck by defendant's train coming from the north and moving in the same direction as was deceased's wagon. He was then returning from Marysville on his empty hay wagon. The railroad tracks were built upon an embankment about seven feet above the normal grade of the county road. The county road approach to the railroad crossing was by an easy grade. Weeds were growing along the top of the embankment. The time was mid-day. The train, a special, was traveling from 55 to 60 miles an hour. The engineer observed the deceased was traveling towards the crossing, but was in a place of perfect safety. Larrabee's horses were traveling at a walk. When the engineer discovered that he was paying no attention to the approaching train the emergency brakes were applied, without success. Larrabee drove upon the track without either stopping, or looking, or listening; or, as the Supreme Court says, if he did look and listen, and under these circumstances heard the whistle and observed the

approach of the train, as he must have done, for admittedly the train would have been visible to him while still in a place of safety at a distance of fifteen hundred feet from the crossing, the unescapable conclusion is that he drove upon the track in wanton carelessness. The Court, in considering the question, says:

"Contributory negligence, of course, presupposes a primary negligence upon the part of defendant, and, for the purpose of this consideration only, it will be assumed that defendant was so negligent. * * *

In this case the positive and uncontradicted evidence discloses that the deceased did not exercise ordinary care, for if he had done so he could easily have escaped his fatal accident. * * *

Moreover, as he ascended the slight grade of the county road approaching the track, he was beyond peradventure of doubt above the obstruction of the weeds while still in a place of safety. He was familiar with the crossing and its environments, he knew of the weeds, and their presence, and if they did interfere with his sight, this so far from justifying him for his failure to use other precautions, imposed upon him the duty of doing so. * * *

There is thus an abundance of direct evidence to show that the deceased did not observe the legal requirements of ordinary care—the requirements of stopping and looking and listening—before he essayed the fatal crossing. The evidence to this effect is direct, positive and uncontradicted. The uncontested facts themselves speak convincingly to the same effect. The man was driving in a slow moving wagon, in broad daylight, was approaching

a crossing with which he was perfectly familiar, and approaching it under circumstances where he could with perfect safety have stopped his progress and looked back to see whether or not a train was approaching him from behind, his view of that train was unobstructed for at least fifteen hundred feet —these very facts overcome the presumption of the exercise of due care, and, as said by this court in *Herbert* v. *Southern Pacific Co., supra,* 'raise a presumption that he did not take the required precautions. * * *

Upon this proposition the court directly instructed the jury that if they found 'that at and just prior to the accident defendant's train was running at an unusual rate of speed, this would not relieve the deceased from the duty resting upon him upon approaching said crossing to stop and look and listen for such approaching train, and if he failed so to do, and such failure contributed directly or proximately to the accident, then, regardless of said speed of said train, your verdict must be for the defendant'. The conclusion is unescapable that the jury ignored this instruction in reaching its verdict and that its verdict is, therefore, against the law."

In the case of *Thompson* v. *Southern Pacific Co.*, 23 Cal. App. Dec. 488 (Sept. 28, 1916), 161 Pac. 21, the same doctrine is announced. In that case a verdict was rendered in favor of the plaintiff and against the company for more than $17,000, the verdict being reversed by the Supreme Court on the ground that there was no evidence to support it.

From the facts, it appears that the plaintiff left Dinuba at about four o'clock in the afternoon of the

accident, traveling in an automobile. That the plaintiff, as he approached the crossing, looked in a southeasterly direction and listened for the purpose of ascertaining whether or not there was a train approaching the crossing, but did not see or hear one. That about 150 yards West of the crossing the plaintiff brought his automobile down to a slow gait and thereafter moved slowly toward the railroad crossing. That there was a row of tall sunflowers extending along the right of way which obstructed the view. That as he approached the crossing he did not stop his machine or look or listen for an approaching train. That he could not have seen it if he had done so unless he had gotten out of the machine and walked up the track. Commenting on this state of facts, the Supreme Court says that the evidence showed very clearly that he was chargeable with such contributory negligence as to preclude recovery:

"In other words, he did not exercise that due care for his own safety which the law demanded of him. It was his duty to stop and look and listen, at some point where such conduct would be effective. According to his own testimony, he knew of the obstructions to his view. But if he had not known of them before, he certainly observed them that day when he attempted to see if any train was approaching. Common prudence under such circumstances would dictate that he bring his machine to a full stop before attempting to cross the track. If he had done so, he would undoubtedly have heard the train approaching. But to exercise due care, under

the situation as revealed to him, the consensus of the opinion of prudent men would require him, if necessary to ascertain whether his life was in danger, to get out of his machine and go forward a few feet on foot in order that the matter might be placed beyond peradventure. We may say, in passing, that the testimony of the plaintiff as to the obstructions of the view seems almost incredible in the light of the whole record, but accepting his statement as true, his misfortune is attributable to his own carelessness. * * *

It is true, as declared in the opinions, that the rule requiring the traveler to *stop* is not an absolute one. If the view is entirely unobstructed, the traveler, while going toward a crossing may see whether a train is approaching in dangerous proximity. Of course, in a case like that it would be idle to require the traveler to stop to find out something that he can ascertain just as well without stopping. He must, however, avail himself of the vision and if he is exercising ordinary care, he need not stop except to allow an approaching train to pass in order to avoid a collision. * * *"

Among the instructions given to the jury in that case is one that the plaintiff had the right to assume, until he reached the point where he might look up and down the track, but no train was approaching the crossing because there was no sound of bell or whistle. This instruction was held to be erroneous. The Supreme Court says:

"If the traveler had the right to assume that defendant's employees would observe the law requiring them to ring the bell and sound the whistle

when approaching the crossing, he would, of course, have a right to rely upon receiving such information of approaching danger and would be entirely excusable for neglecting to avail himself of any other source of knowledge. Again, if he had a right to so assume, if no bell as a matter of fact was rung or whistle sounded, he would have a right to assume that no train was in fact approaching, and he would not be chargeable with negligence if he acted upon that assumption and proceeded to cross the track.

In *Huston* v. *Southern California Ry. Co.* 150 Cal. 703, it is said: 'It is not the law of this state that a person approaching a railroad crossing is authorized to assume that the person operating a train will not in any way be negligent in that operation. This doctrine has been asserted in some of the states, but is opposed to the law as laid down in the decisions of this state and of the Supreme Court of the United States. Such a rule would abrogate the doctrine of contributory negligence in all such cases.' "

In the case of *Martz* v. *Pacific Elec. Ry. Co.*, 23 Cal. App. 513 (Oct. 2, 1916), 161 Pac. 16, the record shows the action is one brought by the widow and three minor children to recover damages on account of the death of Martz, alleged to have been caused by the defendant company. The accident occurred at two o'clock in the afternoon at a highway crossing in Los Angeles County. There is no testimony from any observer as to whether the deceased looked or listened for the approach of the car. There was a conflict in the evidence as to

whether warning signals were given, also as to the rate of speed of the defendant's car. The question presented to the jury was whether or not a person so traveling and using reasonable care in observing would have seen the approaching car, notwithstanding the obstructions of trees and brush along the highway and certain poles erected at intervals along the railroad tracks. It was admitted that the railroad tracks along which the electric car would approach the crossing would be plainly visible from the automobile during at least the last 60 feet of its approach to the south track, and as shown by the photographs, the curve of the railroad was such that the car would have been plainly visible if it was anywhere within 1000 feet of the crossing. The deceased was about 52 years old, in good health, and was driving alone, and the railroad track was in plain view as he came down the road.

Commenting upon these facts, the Supreme Court says:

"This being so, even if (as we must assume to be the fact) he had not seen any approaching car before coming opposite the white building, it was his duty to approach the crossing with reasonable care to have his automobile under control. If we assume that he did this, then when he came within sixty feet of the southerly railroad track he was in a safe situation at all events. If there was no approaching car within a distance of one thousand feet, he would have ample time to cross. For at the rate of thirty miles per hour the railroad car would require at least twenty-three seconds to reach the

point of intersection; whereas the automobile, even at a five-mile rate, would be across in eight seconds. On the other hand, if the approaching railway car was anywhere within the distance of one thousand feet, Mr. Martz must have seen it if he made the most ordinary use of his faculties, and this at least he was bound to do. (*Griffin* v. *San Pedro etc. R. R. Co.*, 170 Cal. 772) (2) The rule is applicable to electric railroads operated under conditions similar to the operation of steam railroads. (*Loftus* v. *Pacific Elec. Ry. Co.*, 166 Cal. 464). And if the car thus observed by the deceased was approaching at such speed and was then within such distance as to cause reasonable apprehension of danger, it was negligence on the part of the automobile driver to attempt such a crossing. Such attempt would be the voluntary assumption of a risk, and for injuries resulting therefrom and which the defendant then had no further opportunity to avoid, the law does not intend to provide compensation.

The only other alternative state of facts which seems possible under the evidence is that Mr. Martz came down the avenue and into the zone of danger at a rate of speed which was reckless under the circumstances, and thus heedlessly placed himself where the concurrent negligence of the defendant caused his death. In this case also there is no right of recovery. (3) Where the physical facts shown by undisputed evidence raise the inevitable inference that the person approaching a railroad crossing did not look or listen, or that having looked and listened, he endeavored to cross immediately in front of a rapidly approaching train that is plainly open to his view, he is as a matter of law guilty of contributory negligence.

It seems clear that there is no question shown upon any possible state of facts consistent with the evidence which can authorize a verdict such as was rendered in this case. The defendant was clearly entitled to a verdict in its favor. Having reached this conclusion, we deem it unnecessary to discuss alleged errors in the instructions given the jury. With respect to the objections urged against these instructions, we express no opinions.

The judgment and order are reversed."

The latest expression of the Supreme Court of California relating to the subject under discussion will be found in the case of *Arnold et al* vs. *San Francisco-Oakland Terminal Railways*, decided April 20, 1917, and found reported in "The Recorder", a law publication printed in San Francisco, under date of April 25, 1917. From that case we quote as follows:

"On the 23rd of April, 1913, Joseph C. Arnold was killed by a collision between an automobile, which at the time he was driving, and a car run by the defendant on its San Pablo avenue line. The plaintiffs, being the widow and children of Arnold, began this action to recover the damages which they have suffered from his death, alleging that the collision was caused by the negligence of the defendant. The cause was tried by a jury, verdict was returned for the plaintiffs in the sum of thirty thousand dollars and judgment was given accordingly. The defendant appeals from the judgment and from an order denying its motion for a new trial.

"For the purposes of our consideration of the case it will be assumed that the evidence was sufficient to sustain a finding that the negligence of the defendant was an operative cause of the collision and injury complained of. The defendant claims that the evidence showed, as a matter of law, that the negligence of Arnold contributed to the injury which caused his death.

"The evidence as to the controlling facts on this question is not substantially conflicting. The defendant was maintaining and operating a double track street car line on San Pablo avenue running from Oakland to Richmond. Schmidt lane, a street sixty feet wide, runs from the east into San Pablo avenue at a point in Contra Costa county about a mile north of the Alameda county line. It does not extend west beyond San Pablo avenue. The western track is used for southbound cars and the eastern track for northbound cars. Its grade for about three hundred feet south of the junction ascends toward the north one foot in a hundred. At the southeastern corner of the junction there is a two-story building, known as Timm's saloon, which obscured the view from the lane southward. For a distance of about five hundred feet east from the junction other objects obscured the view from the lane southward. Schmidt lane descends toward the avenue for that distance at a grade of about one foot in a hundred. The part of San Pablo avenue south of Schmidt lane and east of the street car tracks, including the sidewalk, was 31.4 feet wide. North of Schmidt lane it was 50 feet wide. In front of Timm's saloon and extending around the corner was an awning supported by five posts, one on the north end and the others on the avenue front.

This occupied thirteen feet of the avenue, leaving eighteen feet between it and the street car tracks. It projected eight feet north of the south property line of the lane. The ground all about was practically level and automobiles could travel the avenue either to the north or south. Arnold was 36 years old, mentally and physically sound and in possession of his usual faculties at the time. He was familiar with the conditions at the junction. Driving westerly on Schmidt lane at about the center thereof he approached the junction at a speed of about ten miles per hour intending to cross the tracks and turn south on the avenue on the west side of the tracks. As he reached a point in Schmidt lane from forty-five to fifty-five feet east of the eastern car track he saw a northbound car coming on the track at a distance from sixty-five to eighty-five feet south of the intersection of the projected line of Schmidt lane with the car tracks. Its speed was estimated at from twelve to twenty-five miles per hour. The automobile was a short, five-passenger machine, occupied by himself and three other persons, eleven feet in length over all and weighing about sixteen hundred pounds. The evidence was that with the use of ordinary care and skill it could be stopped within a space of fifteen or twenty feet when going at the rate he was traveling and that a person of ordinary skill, even when going much faster than he was going at the time, with ordinary care, could have turned from the lane, either to the north or to the south, on San Pablo avenue east of the car tracks without coming in dangerous proximity to a car passing thereon. Upon seeing the car Arnold first swerved slightly to the left or south and then swerved slightly to

the north and finally attempted to cross the tracks in front of the coming car. The result was that he collided with the car at a point about opposite the center of Schmidt lane.

"The bare statement of the facts proves beyond question that the lack of ordinary care or skill on the part of Arnold was a directly contributing cause of his injury. He saw the car coming when he was not nearer than forty feet from the tracks. He had abundant time and space to turn to the south, or to the north, or to stop, and avoid danger, if he had possessed ordinary skill and had used ordinary care. No other conclusion follows than that by the lack of ordinary skill or ordinary care he failed to take either course. The only thing that will excuse him of lack of ordinary care is the admission that he did not possess ordinary skill. If the latter be true, it was lack of ordinary care for him to trust himself to drive an automobile in a place of that kind. In either case his contributory negligence is established.

"The argument that Arnold was excusable because he was surprised by the close proximity of the special car to a car that had just passed the junction and that he was not expecting another north-bound car so soon, is deprived of all force by the fact that he actually saw the special car in ample time to have avoided it. To say that the unexpected appearance of a car on the track was sufficient to startle him so as to deprive him of the use of his reason and senses is to convict him of being incompetent to drive an automobile at all on the public streets. There is no evidence that he was unskillful in driving an automobile. But, as we have said, if he was unskillful it was negligence

for him to undertake to drive it at such a place. The evidence proves beyond doubt that he saw the car in time to have avoided it with the use of ordinary care.

"The evidence does not sustain the plaintiff's contention that the defendant is liable under the doctrine of the last clear chance. This doctrine applies where the injured party by his own negligence has placed himself in a position of danger from which he cannot extricate himself, or of which he is obviously unconscious, and the defendant, seeing or knowing his peril or seeing or knowing facts from which a reasonable man would believe him to be in peril, and being able by the use of ordinary care to avoid injuring the plaintiff in his perilous position, fails to use such care and thereby causes the injury. (*Thompson* v. *Los Angeles, etc. Co.*, 165 Cal. 755; *O'Brien* v. *McGlinchy*, 68 Me. 552; *Holmes* v. *South P. etc. Co.*, 97 Cal. 169; *Sego* v. *S. P. Co.*, 137 Cal. 407; *St. Louis etc. Co.* v. *Schumacher*, 152 U. S. 77; *Illinois Central Ry. Co.* v. *Ackerman*, 144 Fed. 959; *Denver City Tramway Co.* v. *Cobb*, 164 Fed. 41; *Green* v. *Los Angeles etc. Co.*, 143 Cal. 41).

" 'A street car cannot go upon the street except upon its rails and hence it has the better right to that space, to which others must yield when necessary'. (*Scott* v. *San Bernardino etc. Co.*, 152 Cal. 610; *Clark* v. *Bennett*, 123 Cal. 279; *Bailey* v. *Market Street Ry. Co.*, 110 Cal. 327). It was the duty of Arnold, upon approaching the crossing, to give way to a car of the defendant which was about to pass at the same time, if necessary to avoid a collision, since he could give way while it could not. The defendant's motorman was not required to

presume that Arnold would not perform this duty. He had the right to presume that Arnold would stop or turn aside, until the conduct of Arnold was such as should reasonably have led him to apprehend the contrary. So long as it appeared that Arnold, with reasonable care, could stop his automobile, or turn it to one side or the other, so as to avoid a collision, and there were no obvious indications that he might not do so, the motorman had the right to assume that he would do so and upon that assumption to proceed along the track. (*Thompson* v. *Los Angeles*, *supra.*) He could have stopped the automobile or turned it aside, in safety if he had begun to do so when he was twenty-five feet away. He displayed no obvious intention to cross the track ahead of the car until the moment when, after swerving to the south, apparently in an attempt to pass south to the eastward of the tracks, he again swerved to the north, apparently with the purpose of turning northerly east of the track, or of passing in front of the street car. The latter swerve did not occur until Arnold had proceeded beyond the east property line of San Pablo avenue several feet. The evidence indicates that it took place when he arrived opposite the corner of the awning, which was 13 feet west of the property line and 18.4 feet east of the car track. The motorman testified that as soon as he saw Arnold coming out of Schmidt lane he did everything that could be done to stop the car and that he stopped it as quickly as it could have been stopped after that moment. This indicates that he started to stop the car even before he had reasonable cause to believe that Arnold would attempt to cross the track in front of the car. There is no substantial evidence contradictory

of this. The doctrine of the last clear chance could not become applicable until Arnold's negligence had brought him so close to the track that he could not by ordinary care either stop or turn aside so as to avoid a collision, or until his conduct showed that he intended to hazard a crossing ahead of the car, and when these conditions became apparent the utmost care by either party would have been unavailing to prevent the accident."

In view of these decisions, indicating a uniformity of principle as enunciated by the various courts, there would seem to be no room for controversy in this case, but that the motion of plaintiff in error for a non-suit should have been granted, or that in lieu thereof the court should have instructed the jury that as a matter of law the deceased was guilty of such contributory negligence as precluded a recovery herein against plaintiff in error, and that the verdict should be in favor of such plaintiff in error.

The decisions to which we have thus referred at length and those hereinafter mentioned, are in accord with the unbroken weight of authorities, in that all the authorities practically agree that if two persons are engaged jointly in a common enterprise requiring for its purpose that they use and occupy a conveyance of some sort, each assumes a responsibility for his colleague's conduct, and if either is injured by the negligence of a third party and the concurring negligence of his companion, the mere fact that he was not at the time driving the common

conveyance will not enable him to recover from the wrongdoer.

When the driver of the vehicle and the injured passenger are engaged in a common enterprise or purpose in which each to some extent is responsible for the acts and conduct of the other, the driver's negligence is to be imputed to the passenger.

Payne v. *Chicago, R. I. & P. R. Co.*, 39 Iowa 523;

Nesbit v. *Garner*, 75 Iowa 314, 1 L. R. A. 152, 9 Am. St. Rep. 486, 39 N. W. 516;

McBride v. *Des Moines City R. Co. (Iowa)*, 109 N. W. 618.

If two or more persons unite in the joint prosecution of a common purpose under such circumstances that each has authority, express or implied, to act for all in respect to the means and agencies employed to execute such common purpose, the negligence of one in the management thereof will be imputed to all the others.

Koplitz v. *St. Paul*, 86 Minn. 373, 58 L. R. A. 74, 90 N. W. 794;

Johnson v. *Gulf C. & S. F. R. Co.*, 2 Tex. Civ. App. 139, 21 S. W. 274.

When two men, employed together, are driving along a railroad track at midnight, seated side by side in an open wagon, returning home from marketing a load of fish; and the track they occupy is one of a pair laid in a public highway with a road-

way upon each side of sufficient width to accommodate safely road vehicles; and both are familiar with the locality, and have knowledge of the trains that run and the method of running them upon such track; and the one not driving makes no effort to avoid danger, no objection to going upon the track, no request to turn into the roadway, and is in full control of his own actions,—he is chargeable with his comrade's neglect; and, if struck and injured by a railroad train, is guilty of contributory negligence as a matter of law.

Donnelly v. *Brooklyn City R. Co.*, 109 N. Y. 16, 15 N. E. 733.

When an intoxicated man is injured at a railroad crossing by the collision of a train of cars negligently operated with an open wagon driven by a companion, who did not exercise ordinary care and watchfulness in looking out for the train, and when the injured man himself exercised no care personally, the team and wagon being under the joint care and control of the injured man, the driver, and two others, their companions, no recovery can be had of the railroad.

Payne v. *Chicago R. I. & P. R. Co.*, *supra.*

A father and son using a horse and wagon for the purpose of moving goods as a business are engaged in a joint enterprise, so that each, when they are upon the vehicle together in the course of that occupation, is responsible for the conduct of the

other; and the son's negligence, if any, while driving, is imputable to the father in case of the latter's injury by a colliding trolley car.

Schron v. *Staten Island Electric Co.*, 16 App. Div. Ill., 45 N. Y. Supp. 124.

Two persons using together a horse and wagon to move furniture are engaged in a joint enterprise, and the negligence of the driver is imputable to his companion, when the latter suffers an injury in a collision with a street car.

Cass v. *Third Ave. R. Co.*, 20 App. Div. 591, 47 N. Y. Supp. 356.

When one of several persons engaged in the joint prosecution of a common purpose, and occupying a wagon driven by one of their number, is killed or injured by the negligence of a railroad company while driving over its track at a highway crossing, each of the party is held responsible for the acts and conduct of the rest, for each is agent of the others; and it is incumbent to prove, in an action against the railroad company for causing the injuries, or death, not only that the deceased or injured person was free from negligence, but that his companion who drove the wagon in which he rode was also guiltless.

Boyden v. *Fitchburg, R. Co.*, 72 Vt. 89, 47 Atl. 409.

When two mechanics using a private wagon to transport themselves and their tools drove upon a

railroad track at a highway crossing in broad daylight without either one of them looking or listening for the approach of a train, and were run down by a locomotive and train of cars that they would have had ample time to avoid if they had looked or listened, they were guilty of such contributory negligence as will prevent either of them from recovering of the railroad company for his injuries, even if the latter was negligent; and the driver, for all the purposes of an action, must be regarded as agent of the other, if the latter was in no wise disabled.

Omaha & R. Valley R. Co. v. *Talbot*, 48 Neb. 628, 67 N. W. 599.

It may be taken, as a rule of law, everywhere recognized, that a passenger in any conveyance, public or private, related or unrelated to his driver, must, in order to recover for injuries sustained through the negligence of a third party, be himself wholly free from contributory fault.

Conceding the rule that a person injured while riding in a vehicle driven by another is not chargeable with the contributory negligence of the driver in which he did not participate, it does not absolve him from all personal care; and, if such driver is a careless and reckless one, and the injured person knows it, proof of these facts is competent and relevant upon the issue of the passenger's own contributory negligence in going to ride with such a driver.

Bresee v. *Los Angeles Traction Co. (Cal.)*, 5 L. R. A. (N. S.) 1059, 85 Pac. 152.

A well-recognized exception to the rule that the contributory negligence of the driver of a private conveyance is not to be imputed to his guest or companion when the latter is injured by the negligent act of a third party is when the injured person is himself a participant in the contributory negligence, or fails to exercise, under the circumstances of the case, such care as he should or might exercise to protect himself.

Colorado & S. R. Co. v. *Thomas,* 33 Colo. 517, 70 L. R. A. 681, 81 Pac. 801.

It is not enough to enable one to recover of a railroad company for an injury inflicted by its moving train at a railroad crossing, through the negligence of the railroad employees while he was riding in a vehicle driven by another, to show that the driver was not negligent; but he must go further and show that he was free from negligence himself.

Chicago, S. F. & C. R. Co. v. *Bentz,* 38 Ill. App. 485.

If one is injured by a third party's negligence while riding on a wagon driven by another, any contributory negligence of the driver which is caused by the injured person's own conduct, will bar a recovery. His conduct, therefore, is a proper subject for inquiry to determine if he was contributorily negligent. The decisions so hold; but they do not hold that the negligence of the driver must be attributed to the injured one irrespective of his

own conduct. Any decisions of other jurisdictions so holding are not authority, but are in conflict with well-established doctrine in the state of Illinois.

West Chicago St. R. Co. v. *Dedloff*, 92 Ill. App. 547.

A plaintiff cannot recover of a defendant guilty of wrongful negligence whereby he sustains injuries if his own negligence, or that of his servant, or anybody else for whom he is responsible, contributed to the injury.

Albion v. *Hetrick*, 90 Ind. 545, 46 Am. Rep. 230.

One who is injured by the descent of a tollgate bar while riding in a private conveyance driven by its owner in an intoxicated condition, and attempting to run the gate without paying toll, although not chargeable with imputed negligence of the driver, is not himself sufficiently free from personal negligence to warrant a recovery from the turnpike company.

Brannen v. *Kokomo G. & J. Gravel Road Co.*, 115 Ind. 115, 7 Am. St. Rep. 411, 17 N. E. 202.

A daughter riding in a buggy drawn by one horse driven by her father, and injured by collision with a train of cars while crossing a railroad track, is bound, in order to recover of the railroad company

for injuries received, to establish her personal freedom from contributory negligence.

Cincinnati, I. St. L. & C. R. Co. v. *Howard,* 124 Ind. 280, 8 L. R. A. 593, 19 Am. St. Rep. 96, 24 N. E. 892.

Although the negligence of a husband in charge of a horse and carriage is not to be imputed to his wife riding with him, in case they were killed by a railroad train when driving across the track, she herself rested under the duty to exercise ordinary and reasonable care; and, if she omitted to warn her husband, or to do aught that she might and should have done to avoid the tragedy, her legal representative cannot recover from the railroad company.

Miller v. *Louisville, N. A. & C. R. Co.,* 128 Ind. 97, 25 Am. St. Rep. 416, 27 N. E. 339.

Irrespective of any question as to whether or not the negligence of a driver of a private conveyance is to be imputed to his passenger in case of injury by a train of cars negligently operated at a railroad crossing, the passenger must be personally free from contributory negligence to recover of the railroad company for the injuries.

Aurelius v. *Lake Erie & W. R. Co.,* 19 Ind. App. 584, 49 N. E. 857.

Notwithstanding the rule that the negligence of a driver is not imputable to his guest when the latter

suffers injury by the negligence of another, it is as much the duty of the guest to use reasonable care and judgment to learn of and avoid danger as it is the duty of the driver.

Vincennes v. Thuis, 28 Ind. App. 523, 63 N. E. 315.

When an injury results to a traveler on a highway negligently obstructed by a municipality, under such circumstances that the municipal corporation would have been liable for the injuries had the traveler himself been free from the negligence; and such traveler is riding in a buggy as the guest of another, driving at a high and reckless speed, with knowledge of the obstacles and more or less intoxicated, on a dark night—his contributory negligence is plain, and defeats a recovery from the corporation. (*Ibid*)

Although a married woman riding in a vehicle driven by her husband, and sustaining an injury by another's negligence, is not imputable with the negligence of her husband, she is not excused from exercising due and ordinary care for her own safety.

Wilfong v. *Omaha & St. L. R. Co.*, 116 Iowa 548, 90 N. W. 358.

A woman injured by collision with a locomotive while driving across a railroad track upon a pleasure excursion in a vehicle furnished and driven by her escort, who had an equal opportunity with her companion to see and appreciate the danger,

and, knowing the driver's purpose to cross the track ahead of the approaching train, neither advised nor suggested caution or delay until it had passed, was herself guilty of contributory negligence sufficient to prevent her from recovering for her injuries upon the ground of negligence of the railroad company.

Bush v. *Union P. R. Co.*, 62 Kan. 709, 64 Pac. 624.

And the rule is the same notwithstanding a finding of fact by the jury that she had no control over driver, horse or vehicle.

Missouri, K. & T. R. Co. v. *Bussey*, 66 Kan. 735, 71 Pac. 261.

While one driving a vehicle hired from a livery stable and driven by the proprietor is not imputable with the driver's negligence in case of injury while crossing a railroad track in front of a running train, he must not himself be guilty of any personal negligence, and is not absolved from ordinary care on his part.

Louisville & N. R. Co. v. *Molloy*, 28 Ky. L. Rep. 1113, 91 S. W. 685.

Although a passenger in a vehicle owned and driven by another over whom he has no control is not imputable with the negligence of that other in approaching and crossing a railroad track, and has not the same degree of responsiblity to the railroad

company as his driver, he is charged with a duty to do whatever is in his power to avoid an injury, and to be free from personal carelessness.

State v. *Boston & M. R. Co.*, 80 Me. 430, 15 Atl. 36.

The same duty rests upon a wife riding with her husband that rests upon any other person accompanying another upon a drive, who has an opportunity to observe and give notice of impending dangers that may be avoided, and who is not absolved from all care because another is driving, although she may not be held to the same degree of responsibility as the driver.

Whitman v. *Fisher*, 98 Me. 577, 57 Atl. 895.

To recover of a railroad company for injuries sustained by a collision with one of its trains of the vehicle in which the plaintiff was driving across the railroad track, he is required to prove not only that the railroad company was negligent, but that his own negligence did not in any way contribute to his injury. The fact that he was riding with another person, who was carefully driving a reliable horse, does not aid his case. If he himself failed to use the care which prudence required, relying wholly upon his companion's vigilance, he must prove that companion to have been exercising due care not only in managing the horse, but in guarding against the danger of passing trains.

Allyn v. *Boston & A. R. Co.*, 105 Mass. 77.

A person seated beside the driver of an open wagon belonging to his and the driver's employer, and injured in a collision with a railway car, has no right to rely implicitly for his own safety upon the driver's care and prudence; but it is his duty, if the driver is approaching street-car tracks at a careless rate of speed, to attempt to have such speed reduced to a safe rate, and, if he makes no effort to that end, he is himself guilty of such contributory negligence as will prevent him from recovering from the railway company.

Holden v. *Missouri R. Co.*, 177 Mo. 456, 76 S. W. 1045.

Few, if any, courts have held that an occupant of a vehicle may intrust his safety absolutely to its driver regardless of the imminence of danger or the visible lack of ordinary caution on the driver's part to avoid harm. The law in Missouri and in most jurisdictions is that, if a passenger is aware of the danger, and that the driver is remiss in guarding against it, and takes no care of himself to avoid injury, he cannot recover for the injury he receives. This is not because the driver's negligence is imputable to the passenger, but because the latter's own negligence contributes to his damage.

Fechley v. *Springfield Traction Co.*, 119 Mo. App. 358, 98 S. W. 421.

A wife riding on the seat of an open wagon beside her husband, who is in charge of and driving the

team, who is injured by a railroad train in a collision with the vehicle as it is crossing the railroad track upon the highway, when both she and her husband omit sufficiently to look and listen for an approaching train, and are both in possession of normal sight and hearing, is herself guilty of contributory negligence sufficient to bar her recovery of the railroad company for her injuries.

Hajsek v. *Chicago B. & Q. R. Co.*, 5 Neb. (Unof.) 67, 97 N. W. 327).

It is not less the duty of a passenger in, than of a driver of, a vehicle, where the passenger has the opportunity, to learn of, and, if practicable, avoid danger.

Brickell v. *New York C. & H. R. R. Co.*, 120 N. Y. 290, 17 Am. St. Rep. 648, 24 N. E. 449.

One who, upon another's invitation, takes passage in a private wagon driven by his host, cannot, without assuming entire responsibility for the driver's conduct, rely wholly upon his guardianship and vigilance, but is bound, if he would escape the imputation of the driver's negligence, to exercise care for his own safety, and be prudent and diligent in his own behalf, to the best of his ability, in dangerous places such as highway crossings of railroad tracks at grade.

DeLoge v. *New York C. & H. R. R. Co.*, 92 Hun. 149, 36 N. Y. Supp. 697.

It is not less the duty of a woman riding in a wagon with her husband and about to drive across a railroad track to look and listen for approaching trains, than it is her husband's duty to do so; and, if she omits that duty, or omits to take any other precaution which an ordinarily prudent person would take in her circumstances, and is injured by an approaching train while crossing the track, she is chargeable with negligence, and cannot recover.

Toledo & O. C. R. Co. v. *Eatherton*, 20 Ohio C. C. 297.

A traveler riding in an open buggy beside the driver hired and employed for the journey, who was struck and killed by a passing railroad train at a highway crossing as he was driving over the track at a point where the oncoming train would have been seen for 1325 feet, if he had looked, is chargeable with negligence in attempting to drive across the track without stopping, looking and listening; and no recovery can be had of the railroad company for negligently causing his death.

Dryden v. *Pennsylvania R. Co.*, 211 Pa. 620, 61 Atl. 249.

One who rides in a vehicle owned and driven by a friend and companion, while not imputable with the latter's negligence in the presence of an unseen and unknown danger, is chargeable with negligence in driving on an obstruction in the highway in plain sight without warning or protesting to the driver;

and, if killed by the overturning of the vehicle by striking such obstruction, no recovery can be had for causing his death.

Lohman v. *McManus*, 9 Pa. Dist. R. 223.

In fact, the overwhelming weight of authority is to the effect that a person approaching a railroad crossing must look out for himself, and the fact that he is riding with another does not relieve him of the responsibility of exercising reasonable care for his own safety.

Griffith v. *Baltimore & O. R. Co.*, 44 Fed. 574, affirmed in 159 U. S. 603, 40 L. Ed. 274, 16 Sup. Ct. Rep. 105;

Partridge v. *Boston & M. R. Co.*, 107 C. C. A. 49, 184 Fed. 211;

Nehrbas v. *Central P. R. Co.*, 62 Cal. 320;

Colorado & S. R. Co. v. *Thomas*, 33 Colo. 517, 70 L. R. A. 681, 81 Pac. 801, 3 Ann. Cas. 700, 18 Am. Neg. Rep. 316;

Chicago, S. F. & C. R. Co. v. *Bentz*, 38 Ill. App. 485;

Cincinnati, I. St. L. & C. R. Co. v. *Grames*, 8 Ind. App. 112, 34 N. E. 613, 37 N. E. 421;

Lake Shore & M. S. R. Co. v. *Boyts*, 16 Ind. App. 640, 45 N. E. 812;

New York C. & St. L. R. Co. v. *Robbins*, 38 Ind. App. 172, 76 N. E. 804;

Miller v. Louisville, N. A. & C. R. Co., 128 Ind. 97, 25 Am. St. Rep. 416, 27 N. E. 339;

Wood v. *Maine C. R. Co.*, 101 Me. 469, 64 Atl. 833;

Lake Shore & M. S. R. Co. v. *Miller*, 25 Mich. 274;

Richfield v. *Michigan C. R. Co.*, 110 Mich. 406, 68 N. W. 218;

Hinkley v. *Wabash R. Co.*, 162 Mich. 546, 127 N. W. 668;

Hutchinson v. *St. Paul, M. & M. R. Co.*, 32 Minn. 398, 21 N. W. 212;

Howe v. *Minneapolis, St. P. & S. Ste M. R. Co.*, 62 Minn. 71, 30 L. R. A. 684, 54 Am. St. Rep. 616, 64 N. W. 102;

Finley v. *Chicago, M. & St. P. R. Co.*, 71 Minn. 471, 74 N. W. 174;

Byars, v. *Wabash R. Co.*, 161 Mo. App. 692, 141 S. W. 926;

Mason v. *Northern P. R. Co.*, 45 Mont. 474, 124 Pac. 271;

Bennett v. *New York C. & H. R. R. Co.*, 16 N. Y. Supp. 765, affirmed without opinion in 133 N. Y. 563, 30 N. E. 1149;

Crawford v. *Delaware, L. & W. R. Co.*, 24 Jones & S. 607, 1 N. Y. Supp. 339, affirmed in 121 N. Y. 652, 24 N. E. 1092;

Flanagan v. *New York C. & H. R. R. Co.*, 70 App. Div. 505, 75 N. Y. Supp. 225, affirmed in 173 N. Y. 631, 66 N. E. 1108;

Hoag v. *New York C. & H. R. R. Co.*, 111 N. Y. 199, 18 N. E. 648;

Mittelsdorfer v. *West Jersey & S. R. Co.*, 77 N. J. L. 698, 73 Atl. 538;

Crossman v. *P. & R. Co.*, 2 Chester Co. Rep. 350;

Atlantic & D. R. Co. v. *Ironmonger*, 95 Va. 625, 29 S. E. 319;

Loach v. *B. C. Electric R. Co.*, 16 D. L. R. 245, 27 West L. Rep. (Can) 407, 6 W. W. R., 322, 17 Can. Ry. Cas. 21, 19 B. C. 177.

The rule, as stated in *Elliott on Railroads*, Vol. 3, 2d ed. Sec. 1174, is that if the person riding in the vehicle knows that the driver is negligent, and he takes no precaution to guard against injury, he cannot recover, for in such case the negligence is his own, and not simply that of the driver. The plaintiff cannot rightfully omit to use care in blind dependence upon another, but must use care proportionate to the danger of which the facts convey knowledge.

A person riding in a buggy, upon the seat with the driver, is bound to exercise care, upon approaching a railroad crossing, to determine whether or not a train is approaching, and no recovery can be had for his death, resulting from a collision with a train, where, knowing that a train is approaching, he joins with the driver in testing the danger of attempting to cross the tracks in front of the train.

Colorado & S. R. Co. v. *Thomas*, 33 Colo. 517, 70 L. R. A. 681, 81 Pac. 801, 3 Ann. Cas. 700, 18 Am. Neg. Rep. 316.

So, a person injured at a railroad crossing, while riding in a cutter as the guest of another who was driving, was held guilty of contributory negligence as a matter of law, in *Lake Shore & M. S. R. Co.* v. *Boyts*, 16 Ind. App. 640, 45 N. E. 812, where it

appeared that he was familiar with the crossing and its surroundings; that he knew when approaching the crossing the time of the arrival of a local freight train from the north; that he knew the train had arrived, a part of which without the engine he saw standing at the depot; that when within 30 feet of the crossing, he had an unobstructed view of the side track, looking south a distance of 60 feet, which increased as he approached the track to 80 feet at 20 feet from the track; and that he failed to look and listen for an approaching train as required by law.

So, where a woman riding with the owner of a wagon and team, who was driving, was injured at a railroad crossing when a locomotive struck the rig, the court in *Lake Shore & M. S. R. Co.* v. *Miller*, 25 Mich. 274, in holding plaintiff guilty of contributory negligence, stated that it must be laid down as a principle of law that persons about to cross a railroad track are bound to recognize and to make use of the sense of hearing as well as of sight,—and if either cannot be rendered available, the obligation to use the other is the stronger,—to ascertain, before attempting to cross it, whether a train is in dangerous proximity; and if they neglect to do this, but venture blindly upon the track without any effort to ascertain whether a train is approaching, it must be at their own risk. Such conduct is of itself negligence, and should be so pronounced by the court as a matter of law.

So, plaintiff's intestate, a woman, while riding in a buggy with another woman who was driving, having attempted to cross before a train, was held guilty of contributory negligence in *Richfield* v. *Michigan C. R. Co.*, 110 Mich. 406, 68 N. W. 218, the court stating that the rule that where, by the negligence of the defendant, the plaintiff was put in a place of danger, and if in an attempt to extricate himself from it he did not take the best hazard, he would not be charged with contributory negligence, was inapplicable to this case. There is not a particle of showing that the woman exercised the least care in approaching this crossing. They were familiar with the streets and the crossing, and yet drove along laughing and talking, and apparently giving no heed to the approach of a train. If they had been exercising any care, they would have heard or seen what others saw and heard. They were not drawn into a position of peril by the negligence of the defendant, but by their own negligence, had placed themselves in such a position, and being there took their chance of crossing in front of the train. We think the court should have directed a verdict in favor of the defendant.

In *Hajsek* v. *Chicago B. & Q. R. Co.*, 5 Neb. (Unof.) 67, 97 N. W. 327, plaintiff and her husband, as they neared the railroad crossing, and while 90 or 100 feet from the track, looked both ways and listened for an approaching train, at which time neither saw nor heard anything to indicate the approach of a train. It was shown that a train

under the circumstances indicated would have been visible for several hundred feet before it reached the crossing. The headlight on the engine was burning. If plaintiff or her husband had listened or looked, they could scarcely have helped seeing the train. They were both seated on a spring seat on the wagon, and the opportunities for observation of plaintiff were equal, if not superior, to those of her husband, who was driving the team. The failure of plaintiff to look and listen for the train during the time they were passing over the 90 or 100 feet, and during which time the train would have moved half a mile, was held such contributory negligence as precluded her from recovering against the railroad company.

So, a recovery was denied where a wife was riding in a wagon with her husband, who was driving, knew that the crossing was an unusually dangerous one, but failed to look or listen or warn her husband, the facts showing that if she had looked she could have seen, and would have seen the approaching train.

Miller v. *Louisville, N. A. & C. R. Co.*, 128 Ind. 97, Am. St. Rep. 416, 27 N. E. 339.

In the above case the engineer thought the husband did not intend to cross, for he stopped the wagon just before the train reached the crossing, but drove on again entering the crossing in time to be struck by the train.

The rule requiring a traveler to look out for trains approaching a crossing is not relaxed, because of the fact that one is being carried in a vehicle owned and driven by another. It is no less the duty of the passenger, where he has the opportunity to do so, than of the driver, to learn of danger and avoid it, if practicable.

Brickell v. *New York C. & H. R. Co.*, 120 N. Y. 290, 17 Am. St. Rep. 648, 24 N. E. 449.

So one who hires a team, vehicle, and driver, with whom he takes passage, is bound to check or remonstrate with the driver in case the latter attempts to cross a railroad track without stopping or listening for approaching trains, and no recovery can be had in case he is killed by the driver's attempt to cross heedless of an approaching train, when he is in an open carriage and can readily discover the peril of the driver's act.

Illinois C. R. Co. v. *McLeod*, 78 Miss. 334, 52 L. R. A. 954, 84 Am. St. Rep. 630, 29 S. 76.

So, one who hires a liveryman to drive him to a certain place must, in order to recover for injury by train at a railroad crossing, have exercised ordinary care, and have been free from personal negligence.

Louisville & N. R. Co. v. *Molloy*, 122 Ky. 219, 91 S. W. 685.

So, one riding beside an employed driver in an open buggy hired for the journey has been held guilty of contributory negligence precluding a recovery from the railroad company for injury at a railroad crossing, where, upon nearing the crossing, a train could have been seen for a distance of 1,325 feet, and such person failed to stop, look, or listen.

Dryden v. *Pennsylvania R. Co.*, 211 Pa. 620, 61 Atl. 249.

So, a passenger in a carryall injured in a collision with a passing train while crossing a railroad track, who is familiar with the location and knows that a train is about due, is guilty of contributory negligence, if he permits himself to be carried upon the track while his fellow passengers in the vehicle are making such a noise by singing and shouting that an approaching train cannot be heard, and he utters no warnings or expostulations, and is favorably situated to alight without danger.

Koehler v. *Rochester & L. O. R. Co.*, 66 Hun. 566, 21 N. Y. Supp. 844.

In the case of *Withey* v. *Fowler Co.*, — Iowa—, 145 N. W. 923, where the plaintiff, while a guest in an automobile, was injured by being struck by a truck, the court, concerning the imputation of a driver's negligence in cases of joint enterprise, said:

"It is somewhat difficult to state a comprehensive definition of what constitutes a joint enterprise as applied to this class of cases, but it is perhaps suf-

ficiently accurate for present purposes to say that, to impute a driver's negligence to another occupant of his carriage, the relation between them must be shown to be something more than that of host and guest, and the mere fact that both have engaged in the drive because of the mutual pleasure to be so derived does not materially alter the situation."

In *Beaucage* v. *Mercer*, 206 Mass. 492, 138 Am. St. Rep. 401, 92 N. E. 774, where two occupants of an automobile were out riding under an agreement to share the expense, and the car became disabled, and one of them telephoned the defendant to tow the car, during the process of which an accident occurred, it was held that, so long as the joint enterprise of the occupants was in force, the contributory negligence of one would bar a recovery by the other, provided the negligence was in a matter within the scope of the joint agreement.

In *Clarke* v. *Connecticut Co.*, 83 Conn. 219, 76 Atl. 523, it was held that the law fixes no different standard of duty for a gratuitous passenger in an automobile than for the driver, but that each is bound to use reasonable care, taking into consideration all of the circumstances, including the passenger's position. The court in this case said:

"Does the fact that the plaintiff was a gratuitous passenger having no control of the automobile bring her within a different rule (from that applicable to the driver of the automobile)? That fact would have great weight in determining whether her con-

duct constituted due care. It would be one of the circumstances, and unquestionably an important one, to be considered in deciding whether her conduct was all that reasonable care on her part called for. A gratuitous passenger, in no matter what vehicle, is not expected ordinarily to give advice or direction as to its control and management. To do so might be harmful rather than helpful. But his presence in the vehicle may so obstruct the driver's view of a car or other approaching vehicle, or other circumstances of the situation may be such, as to make it his duty to look out for threatened or possible dangers, and to warn the driver of such after their discovery. This might be necessary for the passenger's as well as for the driver's safety. On the other hand, the character of the vehicle in which he is a passenger may be such, that to look or listen for approaching cars or other dangers would be unnecessary and useless. For such a passenger to engage in conversation with fellow passengers, and entirely neglect to look out for dangers, or to observe the manner in which the vehicle is being operated, might be the conduct of a reasonably prudent person. It cannot be said, therefore, that in every case, and all the time, it is the duty of a gratuitous passenger to use his senses or to look and listen in order to discover approaching vehicles or other dangers, or that his failure to do so would be a failure to exercise due care. But while this is so, the law, fixes no different standard of duty for him than for the driver. Each is bound to use reasonable care. What conduct on the passenger's part is necessary to comply with his duty must depend upon all the circumstances, one of which is that he is merely a passenger having no control over the man-

agement of the vehicle in which he is being transported. Manifestly the conduct which reasonable care requires of such a passenger will not ordinarily, if in any case, be the same as that which it would require of the driver. While the standard of duty is the same, the conduct required to fulfill that duty is ordinarily different, because their circumstances are different."

And in that case it was held that if a woman who was injured while riding with her husband in an automobile, could, by the exercise of reasonable care, have seen the car which struck the machine and have warned her husband in time to have avoided the collision, and such failure was the proximate cause of her injury, she could not recover, although she did not in fact see the danger in time to warn her husband.

In *Noakes* v. *New York C. & H. R. R. Co.*, 121 App. Div. 716, 106 N. Y. Supp. 522, it was assumed that the rule that a traveler approaching a railroad track is bound to use his eyes and ears so far as there is an opportunity and avoid danger, notwithstanding the neglect of the railroad's servants, applies to a passenger in an automobile approaching a railroad, as well as to the persons in charge of the motive power of the vehicle.

A guest or passenger not for hire injured in a collision was held to have been guilty of contributory negligence under the following circumstances:

Where a man guest thirty-six years of age, who was riding on the back seat of an automobile

on the side from which the train which struck the machine approached, it appearing that for a distance of from 175 to 200 feet there was an unobstructed view of 2000 feet of the railroad track; that he was acquainted with the locality; that he was talking with a fellow passenger seated on the opposite side of the machine; that he failed to look or listen for trains, and that the automobile was proceeding slowly and might, at a word of warning have been stopped in time to have avoided the accident.

Read v. *New York C. & H. R. R. Co.*, 123 App. Div. 228, 107 N. Y. Supp. 1068.

This was the same accident involved in *Noakes* v. *New York C. & H. R. R. Co.*, 121 App. Div. 716, 106 N. Y. Supp. 522, *supra*, in which a sixteen year old girl riding in the automobile was held not to have been guilty of contributory negligence, although the opinion was rendered by a divided court, two out of five justices dissenting.

Where a woman passenger in an automobile of which her husband was in charge made no effort to get out after the machine had become stalled on a street car track on a dark night, notwithstanding that she saw the light of a rapidly approaching car when it was 700 feet away, but merely stood up and signaled the motorman with her hands when the car was about 100 feet away, she having admitted that she could have gotten out, but did not do so

because she thought the motorman would stop. Held, such woman passenger was guilty of contributory negligence, precluding recovery.

Lawrence v. *Fitchburg & L. Street R. Co.*, 201 Mass. 489, 87 N. E. 898.

Where a woman of mature years injured in a collision between a street car and an automobile which her husband was driving testified that she was familiar with the roads in the vicinity and knew the crossing at which the accident occurred; that one coming down the hill approaching the crossing would see trolley wires at a distance of 400 or 500 feet, and also the top of the trolley pole, but that because of the shrubbery the car itself could not be seen unless one was looking for it; that immediately before the accident she was talking with a guest who was sitting beside her; that they were not particularly looking ahead, but that she depended upon her husband to do that; and that the machine was under control and might have been stopped at a word of caution. Held, her contributory negligence was a bar to recovery.

Pouch v. *Staten Island Midland R. Co.*, 142 App Div. 16, 126 N. Y. Supp. 738;

From either aspect of the instant case it would seem that the evidence is insufficient to justify the verdict, *i.e.*—whether the negligence of Tucker be imputed to the deceased, or whether the deceased himself was negligent. From either view, the com-

pany should not be held responsible for the accident. Unquestionably, under these authorities, Tucker, the driver of the automobile, was grossly careless. If he had taken any precautions in looking for the approaching train the accident could never have happened. He was in the zone of safety when the train was in plain view for more than 140 feet and was not in the danger zone until he had actually arrived at the main track. At any time during that interval, if he had momentarily glanced up the track, the accident would have been prevented. The same argument would apply to the deceased. His opportunities for observation were equally as good if not better than Mr. Tucker's. If he had taken the slightest care in approaching the crossing, he could have given ample warning to Tucker. There is no evidence that he exercised the slightest precaution. Therefore, whether the deceased be charged with his own negligence, or that of Mr. Tucker, the verdict is equally indefensible.

Beyond all this, the law of the case, as given to the jury, was that the deceased himself was bound to use ordinary care. They also were instructed of what that ordinary care consisted, *i.e.*—that he was to look and listen for an approaching train, and that if he could have seen the train in time to have prevented the accident, and did not do so, that conclusively showed a lack of care on his part.

Taking the uncontradicted facts in this case together with the law of this case, which to that extent was eminently correct, as shown by the fore-

going authorities, the verdict should have been in favor of the defendant company or the motion for non-suit should have been granted. To say that the deceased, in complete possession of his faculties, at nine o'clock in the morning of a bright day with the train in full view for a distance of 145 feet, took the slightest precaution in attempting to cross in front of it, is too severe a test upon human credulity. All human instinct and knowledge are to the contrary. For all purposes, the deceased, as well as Tucker, might as well have been entirely deaf and stone blind, because there is no scintilla of evidence that they took any precaution whatever while they were traversing the full distance of 145 feet or attempting to use the sense of sight or hearing until it was too late. The only conclusion to be reached by the evidence is that the deceased and Mr. Tucker, heedlessly and recklessly drove in front of a rapidly approaching train while it was in plain view. Comment can add nothing to such a state of facts. No logic can find in it or extract from it any manifestation or idea of that reasonable care or common prudence which the circumstances demanded of the deceased and Tucker in approaching the crossing on that fateful day. Without necessity, and of their own accord, the deceased and Tucker moved heedlessly into danger when each was in complete command of his own action. To quote the language of an eminent jurist, in dealing with a case of this character, the deceased and Tucker moved heedlessly and without

necessity into danger "equaling in courage, excelling in composure, the immortal six hundred at Balaklava; but in care and circumspection, rivaling only the commander who ordered that 'rash and fatal charge.' "

The requirements of the law, moreover, proceed beyond the featureless generalities that when one approaches upon a highway where a railroad is to be crossed upon the same level, it is his plain duty to proceed with caution. As we have seen, the law defines precisely what the term "ordinary care under the circumstances" shall mean in this case.

The question of care at a railway crossing, as affecting the traveler, is no longer a question for the jury. The quantum of care is exactly prescribed as a matter of law. If, therefore, the plaintiff, by looking could have seen, or by listening could have heard, the approaching train, in time to escape, it will be conclusively presumed by the collision either that he did not listen or did not look, or, if he did so, that he did not heed what he saw or heard. Such conduct is negligence *per se*.

This case should not have been left to the determination of the jury. The standard fixed by law is one of specific acts rather than the generality that the conduct must be that of the average ideal man. Common experience has become part of the law, and in a case of this character, it is the duty of the Court to declare that the accident must have occurred through the contributory negligence and want of care of the deceased. No other conclusion

can be drawn. All the evidence in the case as to the conduct of the deceased, precludes recovery.

Courts are not so deaf to the voice of nature, or so blind to the law of physics, that every verdict of a jury in derogation of those laws will be treated as a conclusive finding of fact or of any probative value, simply because of its rendition.

SPECIFICATION OF ERROR NO. 3.

The court erred in giving the instruction quoted under this specification, first, for the reasons given with regard to specification of error number 1, relating to the Selma Ordinance, and second, because the plaintiff in error by the instruction was made responsible for all damages sustained by defendants in error without regard to whether there was or was not any causal connection between the violation of Section 486 of the Civil Code and the happening of the accident, resulting in the damage of which complaint is made; nor is there any qualification to the effect that, *in the absence of contributory negligence*, plaintiff in error would be responsible for an accident occurring by reason of the violation of the section.

Eaton v. *S. P. Co.*, 22 Cal. App. Rep. 473, and cases cited.

This contention is given added weight by the refusal of the court to give the instructions requested by plaintiff in error, as set out in Specifications of Error, Numbers 10, 11 and 12, hereafter referred to.

SPECIFICATION OF ERROR NO. 4.

This specification may be considered in connection with Number 1, *supra.* It being error to admit in evidence the ordinance in question, it was likewise error for the court to instruct the jury that a violation thereof was presumptive negligence.

SPECIFICATION OF ERROR NO. 5.

Plaintiff in error further contends that the following instruction under the evidence in this case was erroneous:

"If you find that the automobile truck was operated and driven solely by the witness Tucker, and that the deceased had no control over the operation of the truck, or no right to exercise control over the same, and that he did not exercise any supervision or control over the same, then you are further instructed that in such case the negligence of Tucker (if he was negligent) is not to be imputed to the deceased so as to constitute contributory negligence on his part; but that to sustain the defense of contributory negligence, the defendant must prove or the evidence must show personal failure, on the part of the deceased to exercise ordinary care.

"In other words, if you find that the deceased, Wright, was riding in the automobile truck, driven by the witness Tucker, and that he, Wright, had neither control of nor the right of control, such driver, and that he was not exercising or assuming control over the truck or such driver at the time of the accident, then to sustain the defense of contributory negligence on the part of the deceased,

it must appear from the evidence that he, personally, as distinguished from the driver of the truck, failed to exercise ordinary care at and immediately prior to the time of the accident which caused his death." (Tr. p. 75.)

Our criticism of this instruction is that there is no evidence in the case warranting the instruction; i. e.—that it is based upon a false premise. It proceeds upon the theory that there was evidence justifying the jury to determine that the deceased had no control over the operation of the truck or right to exercise any supervision thereof. On the contrary, the conceded fact is that the truck was being used in a dual capacity—under lease to the deceased and also being demonstrated to him as a possible purchaser. Under all the foregoing authorities, it would seem that under such a state of facts the negligence of Tucker as a matter of law would be imputed to the deceased. Therefore, the instruction was not proper under the special facts in this case.

SPECIFICATION OF ERRORS NUMBERS 6, 7, 8, 9 AND 15.

We also contend that the following instructions requested by the plaintiff in error should have been given:

"You are further instructed that the direct and approximate cause of the accident in which George Reuben Wright was killed was the contributory negligence and want of care of the deceased and

the driver of the truck, and your verdict, therefore, will be in favor of the defendant." (Tr. p. 79).

"If you find from the evidence in this case that either the deceased, George Reuben Wright, or the driver of the truck, could have seen the train approaching the crossing at which the accident occurred before they attempted to cross the track upon which the train was approaching, and if the accident occurred as the result of their attempting to cross in front of the approaching train while it was in plain view, then the plaintiffs are not entitled to recover against the defendant and your verdict will be in its favor." (Tr. p. 80).

"You are further instructed that if you believe from the evidence that the direct and proximate cause of the accident was the attempt on the part of George Reuben Wright, deceased, and the driver of the truck, to cross the track in front of the approaching train, or if they had listened they could have heard it in time to have stopped their truck and prevented the accident, then you are instructed that the accident was occasioned by the negligence and want of care of George Reuben Wright and the driver of the truck and that the defendant was not liable, and your verdict accordingly will be in favor of the defendant." (Tr. p. 80).

"You are further instructed that if you believe from the evidence that the approaching train was in plain view of either the deceased or the driver of the truck before they reached the track upon which the accident occurred, and that if either of them had looked he could have seen it before they crossed the track, or if either of them had listened he could have heard the train approaching before they crossed the track, and that if either of them

had looked and listened before attempting to cross the track, he could have seen and heard the approaching train and thus avoided any danger, and that while the train was so approaching in plain view of the deceased and the driver of the truck, they attempted to cross the track in front of the approaching train, and that by reason only of any such attempt the accident occurred resulting in the death of George Reuben Wright, then I instruct you that such conduct on the part of the deceased and the driver of the truck was negligence and the plaintiffs cannot recover." (Tr. p. 87).

"You are further instructed that it was Mr. Wright's duty, in approaching the crossing, equally with Mr. Tucker's, to have looked and listened for the approaching train. If, therefore, you believe from the evidence, that if Mr. Wright had looked or listened at any time before the truck actually reached the track upon which the accident occurred, he could have seen or heard the train in time to have avoided the accident, then your verdict must be in favor of the defendant." (Tr. p. 93).

"You are further instructed that the evidence in this case is not sufficient to justify a verdict in favor of the plaintiffs and you will therefore render a verdict in favor of the defendant." (Tr. p. 94).

All of these instructions are based upon the theory that the accident was occasioned through the contributory negligence and want of care of the deceased and are founded upon the premise which we have already argued at length—that the motion for a non-suit should have been granted, and that the evidence is insufficient to justify the verdict. If

we be correct in our theory of the case, then these instructions should have been given and a verdict rendered in favor of the plaintiff in error.

SPECIFICATION OF ERRORS NUMBERS 10, 11, 12 AND 13.

We again contend that the Court erred in refusing to give the following instructions requested by the defendant:

"You are further instructed that if you believe from the evidence that the employees of the defendant company failed to give the warning of the approach of the train either by blowing the whistle or ringing the bell, yet, if you further believe that under the instructions herein given you that either the deceased, or the driver of the truck, if he had looked, could have seen, or if he had listened could have heard the approaching train in time to have avoided the accident by the exercise of reasonable care, then the plaintiffs are not entitled to recover." (Tr. p. 88).

"You are further instructed that neither Mr. Wright nor Mr. Tucker has the right to depend upon the custom, or even the duty enjoined by law, of the engineer or fireman to give the customary signals of the approach of the train, as it was their duty, in approaching the crossing, to look and listen, irrespective of such signals. If, therefore, they could have seen or heard the approaching train if they had looked or listened in time to avoid the accident, then your verdict should be in favor of the defendant, even if you further believe that no warning whatever was given of the approaching

train by the employees of the Company." (Tr. p. 91).

"You are further instructed that if you believe from the evidence that the train was approaching the crossing at an excessive rate of speed and in violation of the ordinance, yet, that fact is immaterial if you further believe that if Mr. Wright or Mr. Tucker had looked towards the approaching train, they could have seen it at any time sufficient to have prevented the accident, then the responsibility of the accident lies with Mr. Tucker and Mr. Wright, and your verdict must be in favor of the defendant." (Tr. pp. 91 and 92).

"You are further instructed that if you believe from the evidence that the employees of the defendant were negligent, that the train was going at an excessive rate of speed, that the whistle of the engine never blew nor the bell rang, and that no warning of any kind was given to Mr. Tucker or Mr. Wright by the engineer or fireman of the train, yet, if you believe from the evidence that Mr. Wright or Mr. Tucker could have seen or heard the approaching train in time to have avoided the accident, if they had looked or listened, then your verdict must be in favor of the defendant." (Tr. p. 92).

The jury were not instructed upon any of these matters, so were wholly unadvised upon this important feature of the case. As we have seen, they had already been instructed that a failure to comply with the ordinance of the city of Selma was presumptive negligence, also that the failure to give the warning required by law was presumptive negligence. (Tr. pp. 72-73).

In view of these instructions we were likewise entitled to have the jury advised upon our theory of the case, i. e., that notwithstanding presumptive negligence on our part, yet, if by taking the precautions required by law in looking and listening, the accident could have been prevented, then the responsibility for the accident rests upon the deceased.

In the case of *Hutson* v. *So. Calif. Ry. Co.*, 150 Cal., at page 703 (89 Pac. 1093), it is said:

"It is not the law of this State that a person approaching a railroad crossing is authorized to assume that the persons operating a train will not in any way be negligent in that operation. This doctrine has been asserted in some of the States, but it is opposed to the law as laid down in the decisions of this State and of the Supreme Court of the United States. Such a rule would abrogate the doctrine of contributory negligence in all such cases, and in the early case of *Meeks* vs. *Southern Pacific R. R. Co.*, 52 Cal., 604, this Court said: 'The 486th section of the Civil Code, providing that a railroad corporation shall be liable for all damages sustained by any person and caused by the locomotive of the corporation when a bell is not sounded or a whistle blown as directed by that section, does not abrogate the doctrine of contributory negligence, or operate to give a right of action where the negligence of the plaintiff * * * materially or proximately contributed to the injury." In *Herbert* v. *Southern Pacific Co.*, 121 Cal. 227 (53 Pac. 651), this precise question was involved, this Court saying: "The only answer to this is, that defendants' employees did

not ring the bell or sound the whistle and that the fireman was not at his place on the left side of the engine. The argument, of course, is that if the signals had been given plaintiff might have heard, and not hearing them, he had the right to assume when he was about to make the crossing that the train had not then reached the whistling post 1,325 feet above, and that the fireman might have seen him in time to have prevented the accident had he been on the lookout. It may be admitted that all this was culpable negligence on the part of defendants' employees. The defense of contributory negligence implies that defendant may have been guilty of such negligence as would justify a recovery by the plaintiff if he were not also in fault. This is no argument, therefore, against the position of the defendant." In *Green* v. *Southern California Ry. Co.* 138 Cal. 1 (70 Pac. 926) the rule of law laid down in *Herbert* v. *Southern Pacific Co.* is reaffirmed, the Chief Justice placing his concurring opinion upon this precise ground. The same doctrine is also announced in *Pepper* v. *Southern Pac. Co.* 105 Cal. 389 (38 Pac. 974) and in *Bilton* v. *Southern Pac. Co.* 148 Cal. 443 (83 Pac. 440). The rule is simply this: That a railroad crossing, from its very nature, is always a place of danger, and a traveler has no right to omit any of the care which the law demands of him, upon the assumption that due care will be exercised in the operation of the train. Says the circuit court of appeals in *Erie Ry. Co.* v. *Kane*, 118 Fed. 234, (55 C. C. A. 129): "Again, counsel for the defendant in error urges that it was not negligence for decedent to be there because he was not bound to anticipate Bowker's negligence through which the

collision came about. It is never negligence, they say, for one not to anticipate negligence in anybody else. There is, however, no such general rule of law or prudent conduct. There are instances where as a matter of law it is negligence not to anticipate negligence in others. As, for instance, it is well setttled in the Federal courts that it is negligence for a highway traveler not to anticipate failure on the part of an engineer to give appropriate signals of approach of his train to a highway crossing. He has no right not to look or listen because he has heard no such signals." This is in accord with the doctrine of the Supreme Court of the United States, as laid down in *Railroad Co.* v. *Houston*, 95 U. S. 697, where it is said: "The failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employees in these particulars was no excuse for negligence on her part. She was bound to listen or look before attempting to cross the railroad track in order to avoid an approaching train and not to walk carelessly into a place of danger.' "

The doctrine in this case was reaffirmed in the very late case of *Thompson* v. *Southern Pacific Co.* 23 Cal. App. 488, 161 Pac 16, supra.

Speaking on the same question, our Supreme Court, in the case of *Larrabee* v. *Western Pacific Ry. Co.*, 52 Cal. Dec. 601, 161 Pac. 750, says:

"Nor is it true, as respondent argues, that the deceased's conduct, otherwise clearly negligent, is relieved from this reproach by virtue of his right

to presume that the defendant would not run its train at an excessive rate of speed in approaching this crossing. Nor does the added circumstance that this was a special train in the slightest change the deceased's legal responsibilities. Railroads are entitled to operate special trains and to operate them at high rates of speed. Their regular trains cannot be and no one expects them to be always on schedule. With all this the deceased was of course familiar. The statement in *Strong* v. *Sacramento & Placerville R. R. Co.*, 61 Cal. 326, and in *Whalen* v. *Arcata & Mad River R. Co.*, 92 Cal. 669, to the effect that the deceased had the right to rely upon the 'performance by those on the locomotive of every act imposed by law upon them when approaching a crossing,' cannot be considered to be the law of this State as affecting the rights and duties of one about to venture to make a railroad crossing. Such a one is not entitled to rely upon such a performance of duty so as to relieve him from the necessity of looking if he does not hear, and of stopping if he cannot see. Suffice it upon this to cite the later case of *Koch* v. *Southern Cal. Ry. Co.*, 148 Cal. 680; *Griffith* v. *San Pedro, L. A. & Salt Lake R. R. Co.*, 170 Cal. 772."

It was argued in the lower court, and we may assume that the same contention will be made here by counsel for defendants in error, that under the evidence, the Court was not justified in granting a non-suit or taking the case away from the consideration of the jury. It will be seen, however, from the number of the foregoing cases decided by our Federal Courts, that they do not hesitate

in a proper case, either to grant a non-suit or give directed verdicts, or reverse cases on appeal where they are satisfied that the evidence is insufficient to justify the verdict.

In *Commissioners, Etc.*, v. *Clark*, 94 U. S. 278, at page 284, 24 L. Ed. 59, Mr. Justice Clifford says:

"Decided cases may be found where it is held that, if there is a scintilla of evidence in support of a case, the judge is bound to leave it to the jury, but the modern decisions have established a more reasonable rule, to-wit, that, before the evidence is left to the jury, there is or may be in every case a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed."

In *Meguire* v. *Corwine*, 101 U. S. 108, at page 111, 25 L. Ed. 899, Mr. Justice Swayne says:

"A judge has no right to submit a question where the state of the evidence forbids it."

And again, in *Bowditch* v. *Boston*, 101 U. S. 16, at page 18, 25 L. Ed. 980, he says:

"It is now a settled rule in the courts of the United States that whenever, in the trial of a civil case, it is clear that the state of the evidence is such as not to warrant a verdict for a party, and that if such verdict were rendered the other party would be entitled to a new trial, it is the right

and duty of the judge to direct the jury to find according to the views of the court. Such is the constant practice, and it is a convenient one. It saves * * * expense. It gives scientific certainty to the law in its application to the facts, and promotes the ends of justice. *Merchants' Bank* v. *State Bank*, 10 Wall. 604, 637 (19 L. Ed. 1008); *Improvement Company* v. *Munson*, 14 Wall. 442 (20 L. Ed. 867); *Pleasants* v. *Fant*, 22 Wall 116 (22 L. Ed. 780)."

This proposition is affirmed in *Anderson* v. *Beal*, 113 U. S. 227, 241, 5 Sup. Ct. 433, 28 L. Ed. 966. *Arthur* v. *Cumming*, 91 U. S. 362, 365, 23 L. Ed. 438;

In *Delaware, Etc., R. R. Co.* v. *Converse*, 139 U. S., at page 472, 11 Sup. Ct. at page 570, 35 L. Ed. 213, Mr. Justice Harlan says:

"But it is well settled that the Court may withdraw a case from them altogether and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed or is of such conclusive character that the Court in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it. *Phoenix Ins. Co.* v. *Doster*, 106 U. S. 30, 32 (1 Sup. Ct. 18, 27 L. Ed. 65); *Griggs* v. *Houston*, 104 U. S. 553 (26 L. Ed. 840); *Randall* v. *Baltimore & Ohio*, 109 U. S. 478, 482 (3 Sup. Ct. 322, 27 L. Ed. 1003); *Anderson Co. Commissioners* v. *Beal*, 113 U. S. 227, 241 (5 Sup. Ct. 433, 28 L. Ed. 966); *Schofield* v. *C. & St. P. Ry. Co.*, 114 U. S. 615, 618, (5 Sup. Ct. 1125, 29 L. Ed. 224). 'It would be an idle proceeding' this

Court said in *North Penn. Railroad* v. *Commercial Bank,* 123 U. S. 727, 733 (8 Sup. Ct. 266, 31 L. Ed. 287), 'to submit the evidence to the jury when they could justly find only in one way."

In *Patton* v. *Texas & Pacific Ry. Co.,* 179 U. S., at page 660, 21 Sup. Ct. at page 276, 45 L. Ed. 361, Mr. Justice Brewer, quoting this last passage, states, "that cases are not to be lightly taken from the jury" but adds:

"At the same time, the judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands chargeable with full responsibility."

There has been no modification of these principles in the recent cases.

District of Columbia v. *Moulton,* 182 U. S. 576, 582, 21 Sup. Ct. 840, 45 L. Ed. 1237;
McGuire v. *Blount,* 199 U. S. 142, 148, 26 Sup. Ct. 1, 50 L. Ed. 125.
Empire State Cattle Co. v. *Atchison Ry. Co.,* 210 U. S. 1, 10, 28 Sup. Ct. 607, 52 L. Ed. 931, 15 Ann. Cas. 70;
Hepner v. *United States,* 213 U. S. 103, 112, 53 L. Ed. 720, 27 L. R. A. (N. S.) 739, 16 Ann. Cas. 960.

In this last case the Supreme Court applies the rule in an action brought by the Government to enforce a statutory penalty and sustained a directed

verdict for the plaintiff. The application of this rule to negligence cases has been many times reiterated.

Patton v. *T. & P. Ry. Co.*, 179 U. S. 658, 659, 21 Supt. Ct. 275, 45 L. Ed. 361;
Southern Pacific Co. v. *Pool*, 160 U. S. 438, 440, 16 Sup. Ct. 338, 339, 40 L. Ed. 485.

In the Estate of Baldwin, 162 Cal. 473, the rule is laid down as follows:

"The conditions under which the course pursued by the Court in this instance is held to be proper are defined by a series of uniform decisions of this Court, to which it will be sufficient to make reference. The doctrine of scintilla of evidence is rejected, as it is by the courts of the United States. (*Commissioners of Marion Co.* v. *Clark*, 94 U. S. 278, 24 L. Ed. 59.) A directed verdict is proper, unless there be substantial evidence tending to prove in favor of plaintiff all the controverted facts necessary to establish his case. In other words, a directed verdict is proper whenever, upon the whole evidence, the judge would be compelled to set a contrary verdict aside as unsupported by the evidence. To warrant a Court in directing a verdict, it is not necessary that there should be an absence of conflict in the evidence, but, to deprive the Court of the right to exercise this power, if there be a conflict, it must be a substantial one. To the support of these incontrovertible declarations of the law, we need do no more than cite *Lacey* v. *Porter*, 103 Cal. 597, 37 Pac. 635; *Davis* v. *California St. R. R. Co.*, 105 Cal. 131; 38 Pac. 647; *O'Connor* v. *Witherby*, 111 Cal. 523, 44 Pac. 227; *Los Angeles, Etc., Co.* v.

Thompson, 117 Cal. 594, 49 Pac. 714; *White* v. *Warren*, 120 Cal. 322, 49 Pac. 129, 52 Pac. 723; *Estate of Morey*, 147 Cal. 495, 82 Pac. 57; *Estate of Chevallier*, 159 Cal. 161, 113 Pac. 130."

The question was very fully considered by our Supreme Court in the *Matter of the Estate of Caspar, deceased*, 172 Cal. Reports 147. In that case the Court states that for a detailed discussion of the proposition reference may be made to *McDonald* v. *Metropolitan Street Ry. Co.*, 167 N. Y. 66.

It, therefore, seems to be quite clear that in the instant case the Court should either have granted the motion for a non-suit or directed the jury to return a verdict for the plaintiff in error, and not having done so, the judgment should be reversed.

Respectfully submitted,

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